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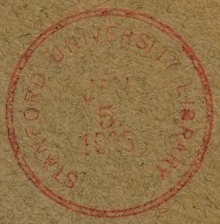


The University of Chicago

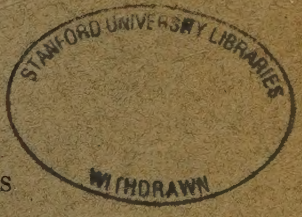
The Administration of Justice from Hesiod to Solon

A DISSERTATION

SUBMITTED TO THE FACULTY
OF THE GRADUATE SCHOOL OF ARTS AND LITERATURE
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY
DEPARTMENT OF
GREEK

BY

GERTRUDE SMITH



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PREFACE

In the following pages an attempt has been made to reconstruct the machinery for the administration of justice in Greece for the period between Hesiod and Solon. Many of the earlier investigators in this field, failing to recognize the continuity of institutions, did not pay sufficient attention to antecedents in earlier practice and survivals in later practice. Nor did they have the benefit of Aristotle's *Constitution of Athens* which has been of great aid in clearing up some much disputed problems. Hence their discussions of such matters as the Areopagus, the Ephetae and the Thesmothetae are inadequate. On the basis of Aristotle's *Constitution* and various modern investigations it has seemed possible to bridge this gap. For the age of Homer and Hesiod I have accepted the conclusions of Professor Bonner in his two studies "Administration of Justice in the Age of Homer," (*Classical Philology* vi. pp. 12 ff.) and "Administration of Justice in the Age of Hesiod" (*ibid.* vii. pp. 17 ff.). The lawgivers and the early codes I have myself discussed in an earlier paper, "Early Greek Codes" (*ibid.* xvii. pp. 187 ff.). These codes, however, with the exception of the great code of Gortyn, furnish little information about procedure. Hence the discussion is largely confined to the Athenian system.

The subject was suggested in a research course in Greek History under Professor Robert J. Bonner at the University of Chicago and the dissertation has been written under his direction. I have constantly availed myself of his advice and criticism and I wish here to express my gratitude for the many helpful suggestions which his thorough knowledge of Greek and Anglo-American law enabled him to give.

GERTRUDE SMITH.

The University of Chicago,
April 14, 1924.

TABLE OF CONTENTS

	Page
Administration of Justice as a Function of Government	1
The Judiciary	11
Procedure in Criminal and Civil Suits	32
Procedure in the Athenian Homicide Courts	44
The Evidentiary Oath	55
Index	79

CHAPTER I

Administration of Justice as a Function of Government

In the early stages of society all wrongs were viewed as offences against the individual and were punished by the injured person. It was entirely a matter between man and man and there was no interference on the part of the government. The earliest, and in the time of Homer at least, the commonest, means of redressing a grievance, especially when it resulted from an act of violence, was by self-help or reprisal. Society placed no restrictions upon this method of dealing with offenders. Indeed the relatives and friends of the injured man were expected to aid him in seeking redress for his wrongs and, on the other hand, the offender was frequently aided by his kinsmen and friends. It was the duty of a man to avenge the wrongs of those under his protection. For example, a father avenged the wrong done a son, the master that done a slave. By means of self-help an attempt was often made to recover stolen property. If a thief were caught in the act he could be killed on the spot. Adultery, seduction, and rape were punished by the husband or nearest relative of the woman involved or by the master in the case of a slave. Another method of dealing with disputes, the beginning of which is seen in the age of Homer, was by the evidentiary oath. This oath might be taken by one party as the result of a challenge from the other party to a dispute or a man might offer to clear himself of an accusation by oath. The taking of such an oath with the consent of the other party settled the case.

The actual administration of justice, however, began with arbitration.[1] Where the dispute was not the result of violence the parties showed a disposition to resort to amicable means of settlement. They naturally sought as their arbitrator a man of eminence in the state—the king, or some other prominent man. Thus from the earliest times arbitrators were practically always chosen from the aristocracy. The second step in the development of the institution is apparent in the age of Homer in the practice of inducing a reluctant opponent by means of challenge or wager to settle a dispute by arbitration. The parties, after depositing with the arbitrator a sum of money or some articles of value, promised under oath to abide by his decision. The

[1] Cf. Bonner, "The Administration of Justice in the Age of Homer," *Classical Philology* vi. p. 22; "The Administration of Justice in the Age of Hesiod," *ibid.* vii. p. 17.

deposits were paid to the winner. Not until the age of Hesiod did the third stage, compulsory arbitration, develop. In case either party desired it the other party was forced to submit to arbitration before representatives of the ruling aristocracy.

But there was as yet no organized and permanent means of dealing with cases in which the state was offended directly or indirectly through one of its citizens. It is true, however, that the popular sentiment against wrongdoers which is revealed in community action and which lies at the base of the conception of criminal law was active in the time of Homer. There are numerous cases in Homer in which popular opinion was active. Especially if a stranger committed an offence against a member of a community the community readily joined the victim in demanding compensation. If the offender himself refused to make reparation his tribe was held responsible. As a result communities became interested in restraining wrong-doing which might involve them in trouble with their neighbors. Popular opinion acted through the assembly of all free men collected normally to hear announcements on public matters.[1] Telemachus summoned the assembly of the Ithacans that he might appeal to them to drive out the suitors. Such an assembly might at any time take action against any public offender. For instance, Hector says that the Trojans would long ago have stoned Paris to death if they had not been timid.[2] After the slaying of the suitors Eupeithes persuaded the assembled Ithacans to go in arms to the palace of Odysseus to avenge the death of the suitors.[3] In the age of Hesiod there are no specific instances of popular action, but a reference in his poems to the popular sentiment against wrongdoers shows that public opinion was active.[4] In the early codes the responsibility of the government for

[1] *Odyssey* ii. 28. Cf. Euripides, *Orestes* 870 ff., where the trial of Orestes is represented as being held before the Argive assembly.

[2] *Iliad* iii. 56 f.

[3] *Odyssey* xxiv. 421 ff.

[4] *Works and Days* 220. Cf. Bonner, *C. P.* vii. p. 21. In the four above mentioned ways of dealing with grievances, namely arbitration, the evidentiary oath, popular action and self-help, can be seen the beginnings of many later developments. Private arbitration undoubtedly continued in practice. It would always be true that some men would prefer compromise to the troubles of litigation. But there is no indication that private arbitration was organized by the state until the Athenians provided a group of men whose services were available for such citizens as desired to settle their disputes by arbitration. The evidentiary oath with modifications continued as a form of trial until at least the second century B.C. and it is found in fifth and fourth century Athenian

the administration of justice, both civil and criminal, is recognized. Judicial functions are assigned to magistrates and other governing bodies.[1]

From the earliest period, then, there was a growing feeling that any action that was opposed to the good order and well-being of the state should be punished by the state.[2] The cases mentioned, with the exception of the slaying of the suitors, have nothing to do with homicide. There the whole community was affected because of the large number of citizens who were slain. The conception of crime and the origin of criminal law are not to be found in actions for homicide.[3] The germs of criminal law are to be found while homicide was still viewed wholly as the concern of the relatives of the victim. In fact, although the state came to regulate homicide trials and executed the punishment, the right to prosecute was always restricted to the relatives of the victim. It cannot be determined with any degree of accuracy when the machinery was provided for the prosecution and punishment of crimes by the state. It has generally been supposed that Solon was the first to establish criminal law by giving permission to "every person who so willed to claim redress on behalf of anyone

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practice in the oath taken in response to a challenge. A survival of it may be seen in the oaths taken by the parties preliminary to a trial. In popular action of the age of Homer may be seen the germ of the Athenian popular courts. It was not until democracy had been established that the assembly of free men became a recognized judicial body. Self-help is recognized in the early codes. The Gortyn code, for example, permits self-help in dealing with an adulterer just as in fourth century Athens it was lawful for a man to kill another caught in adultery with his wife. The laws of Zaleucus permitted a man from whom a slave had been taken to recover the slave and hold him until the trial took place. Homicide was also dealt with by means of self-help.

[1] Cf. Gertrude Smith, "Early Greek Codes," *Classical Philology*, xvii. p. 195.

[2] This feeling is expressed by various later writers. Cf. Plato, *Laws* 768 A: "For all are injured when someone injures the state." Lycurgus, *con. Leoc.* 149: "In aid of my native land and the temples and the laws I have brought this suit as a citizen should, rightly and justly." Stobaeus, *Anthology* iv. 1. 134: "That city fares best and most of all preserves its democracy in which those who have not been wronged no less than he who is wronged denounce the malefactor and punish him." Cf. also Menander, *frag.* 15(Meineke) and Lofberg, *Sycophancy in Athens*, p. 2, for other examples of the same kind.

[3] Cf. Calhoun, "Greek Criminal Law," *Proceedings of the Classical Association* (London), xviii. pp. 87 ff. Cf. p. 103: "Criminal law in ancient Hellas was evolved quite independently of homicide, it was not a by-product of superstitious ceremonial or the sum of a series of random accretions. It resulted from the development and application of a rational theory of crime."

to whom wrong was being done."[1] But in the homicide code of Draco there is a provision that any citizen may either kill or bring before the authorities by the process of ἀπαγωγή a homicide who has illegally returned from banishment He is not prosecuted as a murderer, but as a polluted person wrongfully living in the city and exposing everybody to pollution. He is a public menace. Hence it is clear that Solon merely took a principle already made applicable by the code of Draco to one type of offence and extended it other offences.[2]

There remains then the problem of the motives which induced the state to assume control in homicide cases. From the earliest time self-help was the recognized method of dealing with homicide. There are numerous instances in Homer.[3] Although society as a whole took no part in the punishment of the offender, it expected the relatives of the slain man to kill the murderer and looked upon their failure to do so as the neglect of a solemn duty. On the other hand, honor was the portion of one who avenged a murdered relative. From this situation there might result a series of murders lasting through many generations. The story of the Pelopidae furnishes an admirable illustration of such a blood feud. The nearest relatives were the natural leaders in exacting vengeance, but if no relatives survived, the man's friends might take up the blood feud. If the slain man were of sufficient importance in the community his death might create a situation amounting almost to civil war with the factions of the victim and of the slayer pitted against one another. This is the nearest approach in Homer to the intervention of the community in a murder case.[4] Murder was not yet felt to be a menace to society. It was regarded as the affair solely of the relatives of the slain man and his partisans. Outside of this group there was no popular feeling against homicide except the slaying of a near relative or of a guest, both of which acts were universally condemned by society. It is impossible to say when the menace of a blood feud came to be recognized by the community. Euripides in his description of the trial of Orestes at

[1] Aristotle, *Ath. Pol.* ix. 1. Kenyon's translation. Cf. Calhoun, *op. cit.* p. 88.

[2] Cf. Gertrude Smith, *op. cit*, p. 197.

[3] Cf. Bonner, *C. P.* vi. p. 14; Gilbert, *Beiträge*, pp. 503 ff.; Glotz, *Solidarité de la famille dans le droit criminel en Grèce*, pp. 47 ff.

[4] A good example is furnished by the action of the assembly which determined the fate of Odysseus after he had slain the suitors. The strong popular feeling aroused was undoubtedly due to the wholesale character of the slaughter. *Odyssey* xxiv. 421 ff.

Argos quotes a statute of the Argives, which, in order to avert a vendetta, forbade killing to avenge the death of a relative.

> Else one had aye been liable to death
> Still taking the last blood-guilt on his hands.[1]

If the slayer escaped immediate vengeance his only safety lay in flight. When once the slayer was in exile he was in no danger even if he later met a relative of his victim. There is only one case, that of Aegisthus, in which a murderer suffered death.[2] The third method of settling a homicide case was by the payment of blood money. But this practice appears to have been rather rare. It would never be followed in dealing with murders inside the family group. Freedom from further molestation was, of course, guaranteed to the murderer who paid a blood price. The motives which induced relatives to accept blood money cannot be determined. There is no hint that society urged them to do so in order to avoid a blood feud. Nor is there any indication that they took account of the circumstances under which the homicide was committed for there was as yet no distinction between different kinds of homicide.

The conception of pollution attaching to the homicide and those who associate with him is not found in Homer. The murderer flees only to avoid the vengeance of his victim's kinsmen. In fact it cannot be said with certainty that the conception of pollution is found in Greek literature before Aeschylus. Farnell finds a hint of purification after homicide in the *Iliad*,[3] where Hector says that it is "unlawful for one stained with mud and gore to make prayer unto the cloud-enwrapped son of Cronus." But the reference here is merely to the blood of battle which never was regarded as pollution. Hector is thinking of bodily uncleanliness. Perhaps a nearer approach to this conception is found in the refusal of Eumaeus to accept the wager of the disguised Odysseus involving his death at the hands of Eumaeus in case a prophecy he made should not be fulfilled.[4] The statement that the first genuine case of purification after homicide mentioned in Greek

[1] *Orestes* 512 ff. Way's translation.

[2] *Odyssey* i. 29 ff.

[3] vi. 266-68. Farnell, *Cults of the Greek States*, IV, p. 298; cf. Dempsey, *The Delphic Oracle*, p. 153.

[4] *Odyssey* xiv. 402 ff. Cf. Bonner, *C. P.* vi. p. 14.

literature occurs in the *Aethiopis* of Arctinus depends upon a statement in Proclus and cannot be accepted with certainty.[1] It is quite possible, however, that the idea came in as early as the time of Hesiod because Aeschylus treats it as a very ancient conception.[2] In the age of Hesiod, however, there was no departure from the Homeric practice. Society still expected the kinsmen of the slain to take vengeance. As yet there was no distinction between different types of homicide. Even the husband who slew an adulterer was forced to go into exile.[3]

By the time of Draco several new elements appear in homicide law. The state has complete jurisdiction in murder trials and the right of self-help is entirely denied the kinsmen of the slain man. The only trace of it which remains may be seen in the fact that no one except the relatives of the victim could institute proceedings against the slayer. Voluntary exile was still permitted the homicide, but if he remained and was condemned his punishment was fixed by law. The fragments of the code of Draco and the amnesty law of Solon[4] show that the distinction between different kinds of homicide had been drawn and that five courts already existed before Draco's time for the purpose of dealing with different kinds of homicide. Pausanias says that the court of the Delphinium was established for the trial of justifiable homicide in the time of Theseus.[5] The desirability of recognizing extenuating circumstances and of differentiating the various types of homicide was in all probability a motive for state intervention. It is apparent that religion also was one of the factors which led to the intervention of the state. As soon as the idea was conceived that homicide involved pollution, the slayer was regarded

[1] Cf. Calhoun, *op. cit.* pp. 97 f.

[2] The idea of pollution from homicide and the subsequent purificatory rites are closely bound up with the cult of Apollo Catharsios which does not appear in Homer. The conception of miasma is intimately associated with the chthonic powers, the worship of which did not interest Homer. Farnell, *op. cit.*, regards the post-Homeric development of cathartic ceremonies in connection with the ritual of Apollo as a revival of the ghost cult which existed in pre-Homeric times.

[3] Hesiod, *Fragments*, 144. Cf. Bonner, *C.P.* vii. pp. 21 f.

[4] Cf. Gertrude Smith, "The Prytaneum in the Athenian Amnesty Law," *Classical Philology*, xvi. pp. 345 ff.

[5] I. 28. 10. Cf. Treston, *Poine, A Study in Ancient Greek Blood-Vengeance*, p. 263, who connects the institution of the various Athenian homicide courts with the synoekism of Attica.

as a public menace and society took measures to rid itself of his presence provided that the family refused to act.[1]

It is noteworthy that Athenian homicide courts were always established at some shrine. For example, the Palladium was an ancient shrine of Athena and the Delphinium was a sanctuary of Delphinian Apollo. A criminal would naturally seek refuge from his pursuers at a shrine and as long as he remained in sanctuary his person was inviolable. It was only natural that the criminal should be tried where he took refuge. This is well illustrated in the case of Orestes. He did not go to the shrine of Athena to seek purification, since purificatory rites had already been performed at the instance of Apollo, but to escape the vengeance of the pursuing Erinyes.[2]

The state, then, assumed control in homicide cases because it desired to keep its citizens free from pollution and to prevent blood feuds. No literature of this transition period describes this development, but the case of Orestes as set forth by Euripides belongs to this period. It is difficult to draw any conclusions from the trial of Orestes at Argos because of the impossibility of ascertaining just how far Euripides is projecting back into antiquity the fifth century attitude toward homicide and how far he is consciously trying to present the attitude of more ancient times. Euripides was not an antiquarian, but, being a fifth century Athenian, he would naturally know something about the development of law and legal ideas in earlier times. The portrayal of a more ancient attitude toward murder lends an air of realism to the play. In the same way Aeschylus makes the trial in the *Eumenides* more realistic by introducing some archaic procedure.

Euripides tells the story of Orestes in three plays, the *Electra*, the *Orestes* and the *Iphigeneia in Tauris*. Of these the first two are of far the greatest interest in a study of homicide, as there are only a few passing references to the subject in the *Iphigeneia*. Vengeance is

[1] Cf. Glotz, *op. cit.* pp. 227 ff.; Gilbert, *op. cit.* pp. 508 ff.

[2] In his attempt to prove that Orestes' trial took place in the Palladium Ridgeway, *Classical Review* xxi. pp. 163 ff., emphasizes this point. According to him the earliest step in homicide procedure was the establishment of sanctuaries where the manslayer on taking refuge was tried. The first tribunal was established to try cases in which there were extenuating circumstances, since deliberate murder would continue to be dealt with by the relatives of the slain man.

the predominating theme of the *Electra*.[1] In fact the play consists entirely of the expression of a desire for vengeance on the part of Orestes and Electra and its consummation at their hands while the *Orestes* portrays the results of their action. The *Electra*, then, reflects the Homeric attitude toward homicide, that is blood for blood. There is no thought on the part of either brother or sister of seeking reparation for their father's murder in any other fashion than by killing his slayers. Their father has been murdered. Orestes is his natural avenger. On this account an attempt to compass his death was made by Aegisthus, but was frustrated by his timely removal to Phocis at the hands of an old servant. At intervals throughout the play emphasis is laid on the great struggle in Orestes' mind between his sense of duty in exacting blood vengeance and his horror of matricide. His duty to his father is paramount until the sight of his mother fills him with compassion. In the end the duty to the father triumphs.

In the *Orestes* the impiety of matricide is much more fully emphasized. Murder of others than kinsmen seems to arouse no feeling whatever. Orestes shows not the slightest remorse for killing

[1] The story of the three plays in brief outline is as follows. In the *Electra* the murder of Clytaemnestra and Aegisthus to avenge the death of Agamemnon is accomplished. Orestes, the son of Agamemnon, on returning to Argos, finds his father's slayers ruling the country and Electra, his sister, married to a poor farmer. Orestes had been commanded by the oracle of Apollo to avenge his father's death and has come with his friend Pylades for that purpose. The brother and sister are made known to each other and plot the death of the murderers. Aegisthus is slain while sacrificing, and Clytaemnestra is slain at the house of Electra after she has been induced to come there by a trick. After the deed Castor in the rôle of *deus ex machina* decrees that Electra be given to Pylades as his wife and foretells the madness that is to attack Orestes and his subsequent trial and acquittal at the court of the Areopagus at Athens.

The *Orestes* takes place after the murder of Clytaemnestra and before the departure of Orestes from Argos. Orestes is driven mad by the Erinyes. He is barred from all doors in Argos and consequently from ceremonial purification. Moreover the Argives have decreed that he shall die and a trial is held to decide on the manner of his death—stoning or suicide. Menelaus fails to aid Orestes and he and Electra are condemned to die by their own hands. But Orestes and Pylades gain entrance to the palace, attempt to slay Helen, and capture Hermione, whom they threaten to slay if Menelaus does not aid them. When they are on the point of doing this and of setting fire to the palace Apollo appears on the scene with Helen and decrees a year's exile for Orestes, after which he is to be tried at Athens on the Areopagus for matricide. Again Electra is bestowed on Pylades and Orestes is bidden to marry Hermione.

The Iphigeneia in Tauris relates the wanderings of Orestes after his acquittal in Athens, in search of the image of Artemis, and his recovery of his sister, Iphigeneia, who had miraculously escaped sacrifice at the hands of her father in Aulis.

Aegisthus. In contrast to the insistence on the necessity of avenging a slain relative are placed Tyndareus' protestations against the follies of blood feud with its never ending succession of murders. He mentions an ancient ordinance of the Argives by which purification by exile was substituted for blood vengeance.[1] He insists that Orestes should have brought his mother to trial instead of killing her. Again, he complains of the desire for blood which destroys lands and cities. By this ordinance the Argives recognized that blood feud was a menace to society and as such must be checked by the state. This as has been pointed out is one of the important factors which caused the state to intervene in homicide cases.

The idea of pollution attaching to Orestes as the result of matricide is very prominent in the *Orestes*, and in the *Eumenides* of Aeschylus. Aeschylus supposes that Orestes left Argos immediately after his deed and was purified soon afterward at the temple of Apollo in Delphi. In the *Orestes* on the other hand the matricide is denied purificatory rites and communication with the Argives is forbidden in order that the pollution may not be transmitted to others. This effort to protect the citizens from pollution is the second reason why the state intervened in homicide cases.

The state assumed control in civil suits, then, when the government provided arbitrators and compelled the parties to a dispute to submit to arbitration. This development from voluntary arbitration to a compulsory process of law was complete in the age of Hesiod. The origin of state jurisdiction in criminal matters is to be found in the realization on the part of the community that certain offences, though they might directly affect individuals only, were in fact detrimental to the interests of the citizen body. Community action against public offenders began in the age of Homer through the medium of the assembly. The action of such an assembly was spasmodic and irregular. Under the more highly organized governments of the succeeding periods criminal jurisdiction was regularly exercised by the central political body, a council of elders or a senate under oligarchy, a general assembly or commissions of it under democracy. In the time of Homer an assembly could be convened by any citizen who had a matter of public import to disclose. Anyone who denounced a criminal before such an assembly was virtually a prosecutor. The code of Draco specifically recognizes in regard to a

[1] 512 ff.

single class of offenders, that is unpardoned murderers who had returned from exile, the right of any citizen to prosecute. Solon extended this practice to all offences except homicide. The reasons that led to state jurisdiction in homicide were the desirability of preventing blood feuds, of safeguarding the citizens from pollution and, probably, of differentiating the various kinds of homicide. But the right of prosecution was always restricted to relatives of the victim.

CHAPTER II

The Judiciary

The oldest form of political government is monarchical with the three functions of commander-in-chief in war, judge, and chief priest combined in one person, the king. The Homeric kingship was based on aristocracy. At a very early date this aristocracy as represented by a council of elders began gradually to weaken the powers of the king by assigning certain of his functions to one of their own members. For example, the office of polemarch at Athens was created in this way during the reign of a king who was incapable of exercising the chief command in war. Finally by the distribution of the royal powers among various officials the kingship was put in commission. In Athens the king had become powerful by reducing the chiefs of the local communities and imposing his authority over all Attica. After the unification of Attica had been accomplished in this fashion the petty local chiefs became members of the council of elders.[1]

There are indications in the scanty information which has survived about the legal history of the various Greek states that the council which developed out of this Homeric council of elders regularly retained both judicial and administrative functions. Whether the Areopagus in Athens was an outgrowth of such a council of elders or an entirely new body instituted by Solon is a question which was discussed at least as early as the time of Aristotle. "As to Solon, he is thought by some to have been a good legislator, who put an end to the exclusiveness of the oligarchy, emancipated the people, established the ancient Athenian democracy, and harmonized the different elements of the state. According to their views, the council of Areopagus was an oligarchical element, the elected magistracy, aristocratical, and the courts of law, democratical. The truth seems to be that the council and the elected magistracy existed before the time of Solon, and were retained by him, but that he formed the courts of law out of all the citizens, thus creating the democracy, which is the very reason why he is sometimes blamed."[2] In modern times this problem has occasioned much discussion because of the apparent contradictions in some of the ancient sources and the

[1] Cf. Thucydides ii. 15. Busolt, *Griechische Geschichte* ii. p. 105.

[2] Aristotle, *Politics* 1273 b ff. Jowett's translation.

difficulty of interpreting them.[1] The majority of these ancient sources, however, are subsequent to Aristotle and many of the speculations of modern scholars on the subject were rendered obsolete by the discovery of his *Constitution of Athens* which confirms his statement in the *Politics* if confirmation is needed. But this document, although it has satisfactorily disposed of some phases of the problem, has nevertheless occasioned new difficulties. In his account of the constitution before the time of Draco, Aristotle gives the following description of the Areopagus. "The Council of Areopagus had as its constitutionally assigned duty the protection of the laws; but in point of fact it administered the greater and most important part of the government of the state and inflicted personal punishments and fines summarily upon all who misbehaved themselves. This was the natural consequence of the fact that the Archons were elected under qualifications of birth and wealth, and that the Areopagus was composed of those who had served as Archons; for which latter reason the membership of the Areopagus is the only office which has continued to be a life-magistracy to the present day."[2] According to Aristotle, then, before the time of Solon or, if the Draconian constitution be accepted, up to the time of Draco there existed only one council.[3] This council was a lineal descendant of the Homeric boulé.[4] The dispute as to whether it was called ἡ ἐν Ἀρείῳ πάγῳ βουλή in the early period is of no moment.[5] It is possible that at the time when the

[1] For a convenient summary of modern theories on the subject cf. Ledl, *Studien zur älteren athenischen Verfassungsgeschichte*, pp. 286 ff. Cf. also Treston, *Poine, A Study in Ancient Greek Blood-Vengeance*, pp. 269 ff.

[2] *Ath. Pol.* iii. 6. Kenyon's translation. The scholars who attack the theory that the Areopagus existed before Solon's time reject this passage as an interpolation on the basis of its similarity to the description of the Areopagus under Solon.

[3] *Ath. Pol.* iv.

[4] Actually as the most representative group in the aristocracy the council is comparable to the Homeric assembly which dealt with offences affecting the whole community. It would appear that the arbitral functions of the ancient boulé and the spontaneous judicial functions of the assembly are in a measure combined in the aristocratic council at Athens. For example, it would be the natural body to try cases of homicide, treason and impiety. In the ancient traditions the Areopagus appears as a famous homicide court.

[5] Cf. Headlam, *Classical Review*, vi. p. 295. "The later council of the Areopagus was then the representative of an older Council, the origin of which was lost in antiquity, but which was doubtless descended from the Homeric Council of Elders. It is, however, not so clear that we must follow him (Aristotle) in calling the old Council by the name which it had in later times. If, as seems most probable, there was only one Council then it would certainly be called ἡ βουλή; it may have been connected with the

second council was instituted the council of elders received the name by which it was known in later times. It may also be true that the council thus received its name in the time of Solon and on this account its institution was ascribed to him. There was, however, a tendency in ancient times to refer ancient Athenian institutions to Solon and to this tendency may be due the idea that the Areopagus was instituted by him.[1] After the abolition of the kingship the membership of the council must have been increased to include representatives of all the noble families. Later a further extension of membership was made to include the nouveaux riches who increased in number and importance as commerce expanded. It was now recruited from ex-archons chosen on a basis of wealth and birth. It could not have been so constituted until the establishment of the annual archonship, but that it was so composed before Draco is sufficiently attested by Aristotle.[2] It was still a wholly aristocratic body (*ἀριστίνδην καὶ πλουτίνδην*).

Such an explanation of the origin of the Areopagus fully recognizes the historical continuity of institutions and depends upon the authority of Aristotle whose critical knowledge of the history of Athenian institutions makes him a more reliable source of information than any of the other ancient writers who discussed the history of the Areopagus. These writers, however, are not entirely in disagreement with Aristotle, as some scholars have maintained. The myths attest the great antiquity of the Areopagus as a homicide court. In a fragment of Hellanicus there are collected all of the mythical trials for homicide which were believed to have taken place before the Areopagus.[3] This account is found also on the Parian marble,[4] in Euripides,[5] Demosthenes,[6] and Pausanias.[7] And the name of the

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Ἄρειος πάγος, if so the name is not incorrect; but, if I am right in supposing that there was no older authority than Solon, Aristotle's use of the name for the early period means nothing more than continuity of existence, and does not tell us anything of the earlier usage. Without then necessarily accepting the statement that the Council had always been called after the Areopagus, we may consider it as almost certain that the Council of the Areopagus was substantially identical with the early Council."

[1] DeSanctis, *Storia della Repubblica ateniese*, p. 140.

[2] *Ath. Pol.* iii. 6.

[3] Scholiast on Euripides, *Orestes*, 1648.

[4] *Ep.* 3.

[5] *Electra* 1258 ff. For dramatic purposes Aeschylus in the *Eumenides* changed the order given by the other writers and represented the court as being first instituted to try Orestes.

[6] xxiii. 65 f.

[7] I. 28. 5.

hill was attributed to the fact that Ares was the first to be tried there.[1] A much disputed passage of Plutarch,[2] contrary to the opinion of several scholars, seems to support the theory that the Areopagus existed before Solon. The fact that Plutarch says that the majority believed the Areopagus to be the work of Solon is of no more importance than Aristotle's statement to the same effect.[3] Plutarch's further statement that Draco never mentions the Areopagus in his homicide laws cannot be taken as conclusive proof of the later establishment of the Areopagus. But the following section of the Plutarch passage contains really important information with regard to the Areopagus in the so-called amnesty law of Solon, according to which those were excluded from the amnesty who before Solon had been condemned by the Areopagus.[4] This seems to prove conclusively the existence of such a court before the time of Solon, nor is there any need of Plutarch's attempt to explain the passage by saying that there is an ellipsis and that the passage refers to those who were condemned in cases which at the time of Solon would come under the jurisdiction of the Areopagus. Ledl[5] admits that the passage confirms the existence of a court on the Areopagus in pre-Solonian times. But he is unduly sceptical in refusing to admit that this court was also a council of state. In the early period in Greek states the administration of justice was very closely connected with the government and magistrates and governing bodies regularly exercised judicial functions. If, then, there was a court sitting on the Areopagus it is more than likely that it was a governing body as well.

More difficult to interpret is the passage in Pollux[6] to the effect that Draco instituted the ephetae who sat in all five homicide courts and that in addition to them Solon instituted the council of the Areopagus. His statement may be due to the fact that he found no mention of the Areopagus in the laws of Draco which were extant in his time. Here again Ledl makes a distinction between the court

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[1] Pausanias, *ibid.* Cf. Suidas, Ἄρειος πάγος.

[2] *Solon* xix.

[3] Cf. *supra*, p. 11. Cf. also Ledl, *op. cit.*, p. 288.

[4] Cf. Gertrude Smith, "The Prytaneum in the Athenian Amnesty Law," *C. P.* xvi. pp. 345 ff.

[5] *Op. cit.* pp. 296 f.

[6] viii. 125.

of the Areopagus and the council of the Areopagus, declaring that Pollux is correct in supposing that the court existed in the time of, and prior to, Draco, but that the institution of the council must be attributed to Solon. At the same time he admits that Pollux is wrong in assigning the ephetae as judges to the court of the Prytaneum. In view of Pollux' blunder in making the Prytaneum an ephetic court it is better to say that he is in error also with regard to the court of the Areopagus than to try to explain his reference to it as Ledl does. For he is forced in the end to admit that the ephetae never sat in the court of the Areopagus but rather a pre-Solonian council whose duties were divided by Solon between the council of the Areopagus and the council of the Four Hundred, the judicial functions being chiefly assigned to the Areopagus. His argument fails to recognize that the Areopagus of Solon's time was nothing more than a development of this pre-Solonian council to which were assigned all of the judicial functions which Ledl admits formerly belonged to the pre-Solonian council as well as some of the executive-administrative functions. By failing to recognize this continuity he is led to reject the testimony of Aristotle in favor of the inferior testimony of Pollux whose statement regarding the ephetic composition of the Areopagus during the time of Draco is admittedly wrong. There is obviously, then, no justification for accepting his other statement regarding its institution by Solon when it is at variance with the evidence both of the *Politics* and of the *Constitution of Athens*.

From the earliest times the Areopagus continued to exercise both senatorial and judicial functions. According to Aristotle it virtually administered the government of the state. It also appointed the archons and other magistrates.[1] Its judicial activity is attested by the myths which represent the Areopagus as a homicide court, as well as by Aristotle's account which assigns to the Areopagus of the period before Draco some kind of judicial functions without definitely specifying its character as a homicide court.[2] But this function may well be included under the statement that it "inflicted personal punishments and fines summarily upon all who misbehaved themselves." Apparently all criminal matters were in the hands of the Areopagus. That it dealt with cases of treason before Solon as well as after is

[1] *Ath. Pol.* viii. 2.
[2] *Ath. Pol.* iii. 6.

proved by the amnesty law.[1] The Areopagus then is nothing more than the old aristocratic senate which developed out of the council of elders of the Homeric age. This two-fold function, judicial and political, is quite in accord with the system in vogue in other states. For example, the Council of Elders in Crete, composed of those who had held the office of *κόσμος*, acted both as council of state and as a court.[2] At Sparta the Gerousia, the main function of which was political, was also a court which dealt with criminal cases.[3]

A discussion of the Areopagus inevitably involves an examination of the identity and institution of the ephetae. The question of the origin of this body and its relation to the Areopagus presents even a greater number of problems because of the meager ancient evidence on the subject. One ancient source mentions an age qualification according to which the ephetae were required to be above fifty years of age.[4] Comparing this statement with other known age qualifications at Athens, some scholars have accepted the fifty year requirement in the case of the ephetae. Men over fifty years of age are known to have been chosen as ambassadors.[5] Another example of the fifty year qualification is found in a law of Solon which gave precedence in speaking before the assembly to those who had passed this age.[6] The age qualification for the ephetae occurs only in two

[1] Cf. Gertrude Smith, *op. cit.* Aristotle describes the judicial and senatorial functions of the Areopagus in the time of Solon as follows. "But he (Solon) assigned to the Areopagus the duty of superintending the laws, *so that it continued, as before,* to be the guardian of the constitution in general. It kept watch over the citizens in all the most important matters, and corrected offenders, having full power to inflict either fines or personal punishment. The money received in fines it brought up into the Acropolis, without assigning the reason for the punishment. It also tried those who conspired for the overthrow of the state, Solon having enacted a process of impeachment to deal with such offenders." (*Ath. Pol.* viii. 4.)

[2] Cf. Gilbert, *Griechische Staatsaltertümer*, ii. p. 221.

[3] Cf. Gilbert, *Constitutional Antiquities*, p. 80.

[4] Suidas and Photius, *s. v.* *ἄνδρες ὑπὲρ ν' ἔτη γεγονότες καὶ ἄριστα βεβιωκέναι ὑπόληψιν ἔχοντες οἱ καὶ τὰς φονικὰς δίκας ἐδίκαζον.*

[5] Plutarch, *Pericles* xvii; *CIA* I. 40.17. Poland, *De Legationibus Graecorum publicis*, p. 52, contends that there was once a law forbidding men to be sent on embassies who were not at least fifty years of age, but that the law early fell into disuse. Krech, *De Crateri ψηφισμάτων συναγωγῇ*, p. 36, n. 48, believes that there never was such a law, but that it was customary to send the older men on such missions. If there had been a law to this effect there would be no reason for the inclusion of the age specification in the inscription.

[6] Aeschines, *Tim.* xxiii, *τὶς ἀγορεύειν βούλεται τῶν ὑπὲρ πεντήκοντα ἔτη γεγονότων.* Cf. *Ctesiph.* iv; Gilbert, *Constitutional Antiquities*, p. 294.

late lexicographers. It is extremely likely that it is the result of confusion with the number of the ephetae. When once the confusion arose comparison with other age qualifications would tend to confirm it. Furthermore it is quite improbable that there was an age requirement in the case of the ephetae when there was none for members of the Areopagus who tried the most serious homicide cases. It is absurd to suppose that there was a limit for those who tried less serious cases.

The number of ephetae is established for the time of Draco as fifty-one.[1] There is no known historical reason for such a number and the attempts to explain it have been many and ingenious, but quite unconvincing.[2] Quite a simple and natural explanation lies ready to hand. The ephetae were really commissions of the Areopagus. The odd number at once suggests the analogy of the later popular courts of 201 and 501.[3] The tendency of institutions to persist in more or less modified form even when political conditions are fundamentally changed points in the same direction. The ephetae are the prototype of the popular courts. The odd number is intended to prevent a tie. It is uncertain whether the archon basileus was one of the fifty-one ephetae or whether he merely acted as the presiding officer. In favor of the former view it may be argued that since he voted in the Areopagus he voted in the courts of the ephetae also. It cannot be assumed that he voted in addition to the fifty-one ephetae for that would have destroyed the odd number. If he voted at all it was as an ephetes. On the other side it may be argued that as the chairman of the popular courts did not vote, so the archon basileus did not vote in the ephetic

[1] *CIA* I. 61. Zonaras, p. 926, erroneously gives the number as 80.

[2] Lange, "Die Epheten und der Areopag vor Solon," *Abhand. d. k. sächs. Gesellschaft d. Wissenschaften*, 1879, pp. 204 ff., believes that the Areopagus was composed of fifteen men from each of the four pre-Cleisthenean tribes and that the ephetae consisted of the same body minus the nine archons. Müller (introduction to Aeschylus' *Eumenides*) suggested that the number included five from each of the Cleisthenean tribes with the addition of the archon basileus. Schoemann, *Antiq. jur. publ.* p. 171, advanced the theory that the ephetae were a combination of twelve men chosen from each of the four pre-Cleisthenean tribes and three exegetae. A variation of Schoemann's theory is a substitution of the archon basileus and his two paredroi for the exegetae. The attempt to identify the ephetae with the naukraroi has met with slight approval.

[3] Headlam, *Classical Review*, vi. pp. 252 and 297, suggests that the court of the 51 ephetae must have been the model for the later popular courts with panels of odd numbers. Neither Headlam himself nor subsequent writers recognized the importance of the suggestion for the solution of the much vexed question of the institution of the ephetae. Cf. Wilamowitz, *Aristoteles und Athen*, i. p. 251, n. 137; Gilbert, *Griechische Staatsaltertümer*, i. p. 137, n. 1.

courts. The sharp distinction made between the archon basileus and the ephetae in the Draconian code has led many to believe that he was not an ephetes.

The ephetae cannot be a single group of fifty-one specific individuals. Owing to possible illness, if for no other reason, there could be no assurance that any body of fifty-one men would always be available for service when required. The only means of assuring the attendance of a full complement would be to draw them from a larger body as the need arose, just as the popular courts were drawn from the 6000 annual jurymen. Obviously this group was the Areopagus. Some confirmation of this is to be found in a statement of Pollux, hitherto regarded as an error, to the effect that before Solon the ephetae sat in the Areopagus. ἐδίκαζον δὲ τοῖς ἐφ' αἵματι διωκομένοις ἐν τοῖς πέντε δικαστηρίοις.[1] This expression is perfectly natural if the ephetae were drawn from the membership of the Areopagus. As to the method of selection there can be little doubt that it was by lot which was not unknown in oligarchic constitutions.[2]

The etymologies of ἐφέτης commonly given do not support this interpretation.[3] A further derivation—from ἐφίεσθαι—may be

[1] Pollux viii. 125. The five homicide courts were the Areopagus, the Palladium, the Delphinium, in Phreatto, and the Prytaneum. Cf. *supra*, p. 14.

[2] The evidence of Aristotle makes this suggestion plausible. In speaking of the three homicide courts, the Palladium, the Delphinium, and in Phreatto he says οἱ λαχόντες ταῦτα ἐφέται (*Ath. Pol.* lvii. 4). ἐφέται appears to be the only possible restoration for Harpocration, who discusses the ephetae, derives his information from the *Constitution of Athens*. ἐπὶ Παλλαδίῳ· Δημοσθένης ἐν τῷ κατὰ Ἀριστοκράτους. δικαστήριόν ἐστιν οὕτω καλούμενον, ὡς καὶ Ἀριστοτέλης ἐν Ἀθηναίων πολιτείᾳ, ἐν ᾧ δικάζουσιν ἀκουσίου φόνου καὶ βουλεύσεως οἱ ἐφέται. There is no other extant passage on which Harpocration's statement could be based.

[3] The word occurs in the sense of chief in Aeschylus' *Persae* 79, but this is of no assistance here. Pollux regarded the ephetae as a court of appeal, thus deriving the name from ἐφέσιμος. This description of the court Lipsius pronounces impossible both linguistically and on the ground of the facts in the case (*Das Attische Recht*, p. 15, n. 53). He himself derives the word from ἐφίεσθαι (connected with ἐφετμή) and defines it as "Anzeiger des Rechts," equivalent apparently to the later ἐξηγητής. Schoemann much earlier had claimed this same etymology for the word, but explained it as their determination of how the accused was to be dealt with in individual cases (*de Areopago et ephetis*, pp. 7 f.) But Philippi has shown that such a name might apply equally well to any college of judges (*Der Areopag und die Epheten*, p. 213). He himself accepts Lange's explanation (*de ephetarum Atheniensium nomine*, pp. 11 ff.) that the word is a compound of ἐπί and ἔται, i.e. representatives of the citizens standing in the condition of relationship to one another. According to this view, however, they would constitute an administrative council as well as a homicide court, which was not the case. There

suggested. If the word be understood in the passive sense it can mean "men sent out as a commission" from a larger body. There may be some difficulty in understanding the word passively, since nouns in *-της* denoting agent are regularly active in force. It is not impossible, however, that the noun should have come from the verbal in *-τος* and that under the influence of names of other officials ending in *-της* it was changed by analogy from *ἔφετος* to *ἐφέτης*. This explanation of the word is supported by the word *ἀφέτης* which is used passively of a freed slave.[1]

It may well be that the ephetae were instituted when the distinction between different classes of homicide began to be recognized. The development possibly was as follows. Before different classes of homicide were distinguished the Areopagus tried all cases. All types were treated in the same way. But homicides who had slain unintentionally or felt that their acts were justifiable began to resort to temples for refuge or purification and claimed protection on these grounds, but as litigation and political activity increased it was not convenient to assemble the whole Areopagus so frequently. So, while the whole body continued to sit on the most important cases, they sought relief by drafting sections from their own number to deal with the less important cases.[2] It would be natural to try the suppliants on the spot. Hence the committee would try the case where the suppliant had taken refuge. This is obviously what Photius means when he describes the ephetae as *ἄνδρες οἵτινες περιιόντες ἐδίκαζον*.[3] Just as in later times each Heliastic court represented the whole body of dicasts so the ephetae represented the Areopagus. A passage from Photius describing the ephetae as *ἄριστα βεβιωκέναι ὑπόληψιν ἔχοντες* supports this view. As members of the Areopagus they would be

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is no evidence that they had any functions aside from their activity as a murder court. DeSanctis' view that they had to do with granting permission for religious purification is not deserving of serious consideration (*op. cit.* pp. 169 f.). Ledl, *op. cit.* pp. 335 f., derives the word from *ἐφιέναι* in the sense that the ephetae permit an objection of the defendant to the plaintiff's conception of the act, i.e. they determine whether he shall be tried on a charge of murder or involuntary or justifiable homicide.

[1] Athenaeus 271 F.

[2] There could be different sections, but not concurrent sessions, since the presence of the archon basileus was required at each session of each of the courts.

[3] *s. v. ἐφέται.* The passage is thus quite intelligible and there is no need to emend *περιιόντες* to *π' ὄντες*, in accordance with Zonaras' account of the number. Cf. *supra*, p. 17.

ex-archons and as such would have passed a successful dokimasia and audit before their admission. Hence the description may be accepted as it stands rather than as a perversion of Pollux' *ἀριστίνδην*, as it is usually understood.[1]

This passage of Pollux alone contains a reference to a class qualification for the ephetae. Possibly he derived his statement that they were chosen *ἀριστίνδην* from the law of Draco.[2] But if this is the case he has misinterpreted the law, *τούτους δὲ οἱ πεντήκοντα καὶ εἷς ἀριστίνδην αἱρείσθων*. The word *ἀριστίνδην* refers not to the class from which the ephetae were chosen, but to that from which they were to choose a certain number of phratry members. The fact that Pollux is the sole authority who mentions this qualification lends color to the theory that he merely misunderstood Draco's law. But if this explanation be thought unsatisfactory and Pollux' statement be accepted at its face value it can only be understood to mean that the institution came into existence before the nouveaux riches were included in the aristocracy. But the nouveaux riches before the time of Draco were eligible for magistracies. Hence it is unreasonable that they should submit to be excluded from the Areopagus. The explanation must be that the old qualification continued to be used after the nouveaux riches were admitted to office but was understood to include all members of the aristocracy whether by wealth or by birth. It is not probable that there would be a more stringent qualification for the ephetae than for members of the Areopagus who had the most important political and judicial duties in the state. The ephetae who were instituted for less important work can hardly have been a more exclusive body. In fact, the use of *ἀριστίνδην* may indicate a qualification for the ephetae exactly like that of the Areopagus.

There are no means of determining whether a fresh group of ephetae was drawn for each case or whether they merely filled the gaps due to death, illness or other causes, leaving the personnel the same as far as possible. The analogy of the popular courts does not help. There are some indications that in the fifth century the same group sat day after day under the same magistrate.[3]

[1] Cf. Meyer, *Geschichte des Altertums*, ii. p. 579.

[2] Pollux viii. 125. *ἐφέται τὸν μὲν ἀριθμὸν εἷς καὶ πεντήκοντα, Δράκων δ' αὐτοὺς κατέστησεν ἀριστίνδην αἱρεθέντας.*

[3] Cf. Lipsius, *op. cit.*, pp. 137 f. The later history of the ephetae, which is beyond the scope of the present treatise I hope to make clear in a subsequent paper.

According to Plutarch the Alcmaeonidae who were involved in the curse of Cylon were tried by a court of 300 selected from the aristocracy.[1] This has led to the belief that there was in Athens a second council, composed of 300 members.[2] But there is no evidence whatever for any further activity on the part of such a body and it is much more plausible to suppose that a special court was provided for this very important case.[3] Any theory with regard to the composition of the court must necessarily be entirely conjectural, but it may be suggested that for important trials the number of ephetae could easily be increased. The members of this tribunal being Areopagites constituted a representative commission of the sovereign body of the state. In the same way under the system of popular courts in later times enlarged juries, e.g. 1001, occasionally tried cases.[4]

With the council of the Areopagus were associated the officials who had inherited the royal powers. Aristotle describes the gradual transition from kingship to aristocracy. "Now the ancient constitution as it existed before the time of Draco, was organized as follows. The magistrates were elected according to qualifications of birth and wealth. At first they governed for life, but subsequently for terms of ten years. The first magistrates, both in date and in importance, were the King, the Polemarch and the Archon. The earliest of these offices was that of the King, which existed from ancestral antiquity. To this was added, secondly, the office of Polemarch, on account of some of the kings proving feeble in war; for which reason Ion was invited to accept the post on an occasion of pressing need. The last of the three offices was that of the Archon, which most authorities state to have come into existence in the time of Medon. Others assign it to the time of Acastus, and adduce as proof the fact that the nine Archons swear to execute their oath 'as in the days of Acastus,' which seems to suggest that it was in his reign that the descendants of

[1] *Solon* xii.

[2] Cf. Philippi, *Der Areopag und die Epheten*, pp. 240 ff.

[3] Cf. Wilamowitz, *Aristoteles und Athen*, ii. p. 55. "Schliesslich erzwang die Gemeinde doch eine Abrechnung; aber sie geschah bereits durch ein grosses Ausnahmegericht von 300 Standesgenossen." Cf. the boulé of the partisans of Isagoras which Cleomenes tried to establish in a later attack on the Alcmaeonidae at Athens (Herodotus v. 72). It also consisted of 300 members. Cf. Sandys, *Aristotle's Constitution of Athens*, p. 1.

[4] Cf. Vinogradoff, *Outlines of Historical Jurisprudence*, vol. ii. *The Jurisprudence of the Greek City*, p. 181.

Codrus retired from the kingship in return for the prerogatives conferred upon the Archon. Whichever way it be, the difference in date is small; but that it was the last of these magistracies to be created is shown by the fact that the Archon has no part in the ancestral sacrifices, as the King and Polemarch have, but only in those of later origin. So it is only at a comparatively late date that the office of Archon has become of great importance, by successive accretions of power. The Thesmothetae were appointed many years afterward, when these offices had already become annual; and the object of their creation was that they might publicly record all legal decisions, and act as guardians of them with a view to executing judgment upon transgressors of the law. Accordingly their office, alone of those which have been mentioned, was never of more than annual duration. So far, then, do these magistracies precede all others in point of date. . . . They had power to decide cases finally on their own authority, not, as now, merely to hold a preliminary hearing."[1]

Along with the political functions of the king the three archons inherited his judicial functions which tended to overshadow their other duties.[2] The exercise of judicial functions by the magistrates was characteristic of Greek legal systems.[3] The archons did not sit as a body, but each archon adjudicated the cases assigned to him. They had final jurisdiction, for not until the reforms of Solon was provision made for an appeal from the decision of the magistrates.[4] The archon judged mainly cases in which the family was involved, that is cases of injured parents, orphans, or heiresses. The jurisdiction of the archon was concerned with civil suits, especially those dealing with property. No doubt a survival from a period when his jurisdiction was much wider is to be found in his proclamation on

[1] *Ath. Pol.* iii. Kenyon's translation.

[2] In the case of the polemarch this can be definitely shown. Before the time of Cleisthenes there are several instances of Athenian generals in chief command in battle in place of the polemarch. Cf. Thompson, "The Athenian Polemarch," *Transactions of the American Philological Association*, 1894, p. xviii. At the battle of Marathon the position of the polemarch was purely honorary, a mere survival of the real power which he once possessed. Judicial duties tended to confine him to the city. When the Athenians began to send out commercial and colonizing expeditions the generals must have assumed the actual command. Thompson concludes that the time when the polemarch lost his actual command cannot be determined, but the development of the στρατηγία must have begun about the end of the seventh century.

[3] Cf. *infra*, p. 25.

[4] *Ath. Pol.* ix. 1.

entering office to the effect that "whatever anyone possessed before he entered into office, that he shall possess and hold until the end of his term."[1] The polemarch was for foreigners what the archon was for citizens, and the archon basileus conducted cases connected with religion. In particular he was the presiding officer in homicide courts. There has been some dispute as to whether the king archon presided alone or was joined by certain other officials. The code of Draco represents "the kings" as presiding at the preliminary investigation in a homicide case and as deciding before which court the trial would be held, δικάζειν δὲ τοὺς βασιλέας αἰτιῶν φόνου. The amnesty law of Solon mentions "kings" as presiding at all five homicide courts.[2] Four theories have been advanced as to the identity of these kings: all of the nine archons or at least the first three;[3] the phylobasileis or kings of the pre-Cleisthenean tribes;[4] the archon basileus and the phylobasileis combined;[5] the archon basileus alone.[6] Against the first of these theories it may be objected that such a designation of the archons in an official document after the institution of the annual archonship is unthinkable. If the phrase were so understood when the law was copied down for practical use in 409/8 it would surely have been changed for at that time the king archon presided in murder courts and would naturally be alone thought of. Another objection to the theory is that a court of the nine archons under the presidency of the king archon is inconceivable. In such a case the archon eponymous would naturally have held the presidency. The second of the four theories is negligible since the king archon must have been included whether he presided alone or in conjunction with the phylobasileis. The combination of the king archon and the phylobasileis is supported by the plural number alone. But the plural number may be explained otherwise. In one of the later speeches of Antiphon whose career ended in 411, it is definitely

[1] *Ath. Pol.* lvi. 2. Cf. Bury, *History of Greece*, p. 171.

[2] Andocides i. 78. For a revised text of the law cf. Gertrude Smith, "The Prytaneum in the Athenian Amnesty Law," *C. P.* xvi. p. 348.

[3] Curtius, *Berichte d. Berl. Akad.* 1873, pp. 288, 290.

[4] Wachsmuth, *Stadt Athen*, i. pp. 469 ff.

[5] Schoemann, *Jahr. f. kl. Phil.* cxi. pp. 153 ff.; cxiii. pp. 16 ff.; Lipsius, *op. cit.* p. 26; Treston, *op. cit.* pp. 195 ff.

[6] Köhler, *Rheinisches Museum*, xxix. p. 8; Kirchhoff, *CIA* i. 61; Lange, *op. cit.*; Philippi, *op. cit.* pp. 233 ff.; Busolt, *op. cit.* ii. p. 159, n. 1; Gilbert, *Beiträge*, p. 489, n. 2; Gertrude Smith, *op. cit.* pp. 352 f.

stated that the king conducted the preliminary investigation in homicide cases.[1] There is no reference to phylobasileis or any other kings. The procedure here referred to is that of the law of Draco. These laws were revised and inscribed in 409/8. It is impossible that any change should have been made in the presidency of the homicide courts in this revision. The "kings" in the law must, as Köhler suggests, be the king archons in succession.[2]

Aristotle is the sole important authority for the origin and institution of the thesmothetae. The purpose of their creation was ὅπως ἀναγράψαντες τὰ θέσμια φυλάττωσι πρὸς τὴν τῶν ἀμφισβητούντων κρίσιν.[3] This is not a very explicit statement; Aristotle is probably etymologizing. Modern scholars have argued that their duty was either to reduce to writing the customary law in an authoritative form or to record the legal principles underlying the decisions either of themselves or of other judicial officers.[4] Either view presents difficulties. It is possible, however, that they were both judicial officers and in a sense also legislators. It is quite natural that as the city grew and judicial business increased the need should be felt for additional officials to take care of the business which did not fall under the jurisdiction of any of the three archons.[5] To relieve the archons

[1] vi. 42. Jebb, *Attic Orators* I, p. 62, n. 1, places this speech several years after the *de caede Herodis* which was probably spoken between 421 and 416 B.C.

[2] The plural βασιλῆς in Plato, *Menexenus* 238D, has regularly been understood to refer to the king archons. Cf. Shorey, *Classical Philology* v. p. 361, who advances the theory that the word here is to be understood in the Platonic sense.

[3] *Ath. Pol.* iii. 4. A similar statement appears in the *Lexica Segueriana* (Bekker, *Anecdota* i. p. 264) and in Harpocration, *s. v.* θεσμοθέται.

[4] Cf. Lipsius, *op. cit.* p. 12, n. 44; Busolt, *op. cit.* ii. p. 177; Ziehen, *Rhein. Mus.* liv, pp. 335 ff.; Wilamowitz, *op. cit.* i. p. 245; Sandys, *op. cit.* p. 8; Botsford, *Athenian Constitution*, p. 129; Bury, *op. cit.* p. 176; Ledl, *op. cit.* p. 269.

[5] The various theories which have been advanced regarding the number and origin of the thesmothetae have no bearing on this discussion. It has been suggested that they originated as πάρεδροι or assistants to the other magistrates and were made independent judicial officers to take over part of the judicial business of these magistrates. Cf. Gilbert, *Constitutional Antiquities*, p. 113; Lecoutère, *L'Archontat athénien*, p. 114. This theory is inconsistent with their later activity as a college. Bury, *op. cit.* p. 176, suggests that "the number of six was determined by the fact that they originated in a compromise between the orders, three being Eupatrids, two Georgi, and one a Demiurgos." DeSanctis, *op. cit.* p. 137, contends that the number was not originally six, but that new thesmothetae were added as the number and importance of the cases which came before them increased.

the college[1] of the thesmothetae was created who presumably took over cases which were not connected with the official duties of the three archons.[2] With their institution there came into existence alongside of the magistrates with judicial functions a body of special judicial officers. A definite attempt is thus made to systematize more highly the administration of justice. This practice is characteristic of other Greek judicial systems. In the Gortyn code, for instance, the κόσμοι or chief magistrates had special judicial functions. For example, the κόσμος ξένιος in his character as judge, seems to be parallel to the polemarch at Athens. Aside from the κόσμοι there were special judicial officers, referred to always as δικασταί. They correspond in a general way, in so far as they were specially appointed for judicial purposes, to the thesmothetae. This is a normal development which is bound to take place with the expansion of the state and the consequent growth of litigation.

In applying customary law to specific cases and recording their decisions they are in a sense legislators, because, as has been well said, "in the absence of a written code, those who declare and interpret the laws may be properly said to make them."[3] It may be suggested that the practice of recording judicial decisions was new at the time of their institution and that their name is due to the novelty of the custom now followed by all magistrates. Aristotle employs the word θέσμια. The more common form θεσμοί, analogous to the θέμιστες of Homer, includes both general laws and particular sentences.[4] The two ideas are not yet discriminated. General law is conceived only in its application to some particular case. "The thesmothetae, therefore, received their name not merely from the fact that they

[1] DeSanctis, *op. cit.* p. 136, asserts that the thesmothetae did not act as a college, but separately. He argues also that the even number of six is opposed to their acting as a college. Grote admits that the thesmothetae sometimes acted as a board, sometimes individually (*History of Greece*, iii. p. 74). Lipsius, *op. cit.* p. 68, n. 60, is right in contending that they acted only as a college.

[2] It is quite possible that the thesmothetae came into existence at the time when the archonship was made an annual office. Busolt, *op. cit.* ii. p. 177, asserts that the institution could not have been created until there was written law. Laws were not written until the seventh century so that Aristotle is correct in placing the institution after the beginning of the annual archonship. In 630 (attempt of Cylon) there were nine archons (Thucydides i. 126). So they must have been instituted about the middle of the seventh century.

[3] Thirlwall, ii. 17, quoted by Sandys, *op. cit.* p. 8.

[4] Grote, *op. cit.* iii. p. 75.

made law by administering it, but from being the first to lay it down in written decisions."[1]

The advantage of this explanation is that it accounts for the later two-fold function of the thesmothetae in the fifth and fourth centuries. Aside from their strictly judicial business which included a large variety of cases they had general supervision of the laws and directed their annual revision.[2] These duties were a natural outgrowth of their early activities as makers and recorders of judicial decisions. In the fifth and fourth centuries the thesmothetae were mainly concerned with criminal cases. Civil suits ordinarily came before the Forty and the εἰσαγωγεῖς. In the early period cases that intimately concerned the whole public were dealt with by the body most representative of public opinion. Thus in Homer the assembly was the normal medium for the expression of such public will as there was.[3] Under the aristocracy in Athens in the pre-Solonian period the senate was the most suitable body for taking public action. The Areopagus appears only as a homicide court in the fifth and fourth centuries, but in an earlier period it dealt with matters which concerned the entire community,e.g. treason and impiety.[4] Now the jurisdiction of the thesmothetae must have fallen between that of the archons and that of the Areopagus. This would include both criminal and civil suits. Aristotle's words τὴν τῶν ἀμφισβητούντων κρίσιν may indicate, as DeSanctis believes, that the majority of the cases which originally came before them were civil suits.[5] It may be a matter of accident that in divesting themselves of a part of their duties as litigation increased they tended to reserve criminal cases for themselves and to turn over civil suits first to the δικασταὶ κατὰ δήμους and later to other officials, namely the Forty and the εἰσαγωγεῖς.

On the basis of a passage in Plutarch referring to the amnesty law of Solon a number of scholars wrongly believe that in pre-Solonian times there existed a court at the Prytaneum, distinct from the homicide court of the same name, which tried those who were accused

[1] Kenyon, *op. cit.* p. 8. Cf. DeSanctis, *op. cit.* p. 133, "tesmoteta è in realtà ogni giudice in quanto afferma dei principî di diritto applicandoli al caso speciale."

[2] Gilbert, *op. cit.* p. 302.

[3] Cf. *supra*, p. 2.

[4] Its jurisdiction in the fifth and fourth centuries over those charged with tearing up sacred olive trees is a survival of this practice. Cf. Lysias vii.

[5] *Op. cit.* p. 136.

of attempting to establish a tyranny.[1] This law which Plutarch reports in his own words is reproduced in the decree of Patrocleides of the year 405 which reenacted the ancient law of Solon. The amnesty was extended to all ἄτιμοι, πλὴν ὁπόσα ἐν στήλαις γέγραπται τῶν μὴ ἐνθάδε μεινάντων, ἢ ἐξ Ἀρείου πάγου ἢ τῶν ἐφετῶν ἢ ἐκ πρυτανείου ἐδικάσθη ὑπὸ τῶν βασιλέων ἢ ἐπὶ φόνῳ τίς ἐστι φυγὴ ἢ θάνατος κατεγνώσθη ἢ σφαγεῦσιν ἢ τυράννοις.[2] The five homicide courts are here listed. The words ἐκ πρυτανείου refer to one of these. At no time in Athenian history could so serious a crime as treason have been dealt with either by the king archon and the phylobasileis,[3] or by the nine archons under the chairmanship of the archon basileus, an official whose duties were religious in character.[4]

In brief, the officers and bodies which composed the Athenian judiciary in the early period were the following. The three archons exerci ed judicial functions in addition to their political activities. Beside these there existed a group of special judicial officials called thesmothetae. The Areopagus, composed of ex-archons after the institution of the annual archonship, had a two-fold character, for it was both an administrative and a judicial body. Commissions of the Areopagus, the members of which were known as ephetae, were appointed to try less important homicide cases in the Palladium, the Delphinium and in Phreatto. It is possible that several sections might meet together to try special cases which were not important enough to come before the Areopagus assembled as a whole. Lastly, the phylobasileis, sitting in the Prytaneum under the presidency of the archon basileus, tried animals and inanimate objects which had caused the death of a human being.[5]

Available information with regard to the Athenian judiciary,

[1] *Solon* xix.

[2] Andocides i. 78. For the text here given and a detailed discussion of the whole law, cf. Gertrude Smith, *CP.* xvi. pp. 345 ff.

[3] Meyer, *Geschichte des Altertums*, ii. 233A; Keil, *Die Solonische Verfassung*, pp. 108 ff.

[4] Lange, *op. cit.* p. 223; Philippi, *op. cit.* pp. 217 ff.; Lipsius, *op. cit.* pp. 24, 61 ff.

[5] The discussion regarding the identity of the prytaneis mentioned in the constitution of Draco (Aristotle, *Ath. Pol.* iv. 2) is not of great importance for the purpose of this treatise. They may have been identical with the nine archons (cf. Sandys, *ad loc.*), or they may have been the presidents of the new council. They do not, however, affect the discussion of the judiciary of the period. Gilbert, *op. cit.* p. 125, suggests that they were the standing committee of the new council and that to them were transferred some of the judicial powers which the Areopagus had formerly exercised.

despite its many difficult problems, is far fuller than that with regard to any other. The surviving fragments of the Greek codes, however, indicate that there were regularly two groups of judicial officials,—magistrates with judicial functions and especially appointed judicial officials. At Gortyn in Crete, for intance, the judges were divided into two groups, the first of which consisted of magistrates with judicial functions called κόσμοι, ten in number.[1] Their exact function is uncertain, nor is it even clear that all of the κόσμοι acted as judges. It is likely that it was an annual office, since the name of one of them served to date the year.[2] The most frequently mentioned is the κόσμος ξένιος who apparently corresponded to the polemarch at Athens, the representative of all non-citizens.[3] It is the recorder of this κόσμος who pays the sum due the adopted child after his repudiation.[4] As the protector of the rights of the freedman he appears in a popular decree.[5] The particular κόσμος is not specified before whom the heirs-at-law must take their case if some one marries an heiress contrary to law.[6] Perhaps, as was the case with the eponymous archon at Athens, so at Gortyn the eponymous κόσμος had charge of matters dealing with the family; but the analogy cannot be pressed. The second group of judges—δικασταί—were appointed especially as judicial officers. They are given specific names in only two instances, τôι τᾶν ἑταιρηιᾶν δικασστᾶι and ὅς κα τὸν ἐνεκύρον δικάδηι,[7] but the functions of these two judges are not clear. The law specified the judge before whom each particular case was to be brought, μ̄ολὲν ὀπε͂ κ' ἐπιβάλλε͂ι, ϝεκάστ̄ ἔγρατται.[8] There were evidently then different courts for the different kinds of suits just as at Athens, with the distinction that in Gortyn the court consisted of one judge before whom the trial took place rather than a jury.

Other Greek legal systems also assigned judicial functions to the regular magistrates. In Sparta the kings retained some judicial func-

[1] For the date of the Gortyn code, cf. *infra*, p. 32, n. 4.

[2] Gortyn Code, v. 6. Cf. the eponymous archon at Athens.

[3] Cf. Lipsius, "Zum Recht von Gortyn," *Abhand. d. k. sächs. Gesellschaft d. Wissenschaften*, xxvii. pp. 393 ff., for a court for foreigners for complaints of foreigners against citizens.

[4] Gortyn Code, xi. 14 ff.

[5] Ziebarth, *Das Stadtrecht von Gortyn*, p. 33. i.

[6] Gortyn Code, viii. 55.

[7] Ziebarth, *op. cit.* p. 32.

[8] Gortyn Code, ix. 23. Cf. vi. 29 ff.

tions, in general all cases which involved family rights. The ephors decided suits which arose out of contracts unless the dispute was settled by arbitration. They also had judicial functions in connection with their duties as superintendents of police.[1] Such also was the case among the Locrians under the laws of Zaleucus.[2] Of the two groups the magistrates acting as judicial officers are of course the earlier, a survival from the time when religious, political and judicial functions were all combined in the person of a king. Special judicial officers were naturally created as the state expanded. Some of the early codes apparently provided for popular courts. That the people of Catana in Sicily had popular courts under the laws of Charondas is shown by the law imposing a fine for failure to perform jury service,[3] but there is no information about their organization or jurisdiction. There are references to δικασταί which probably refer to the jurors of these popular courts.[4] In one case at Locris the proceedings were before the assembly of 1000.[5] But this was an action for the alteration of an existing law and the people, if they constituted the legislative body, would naturally hear the case. It does not imply that they were also a regular judicial body.

There are references to other judicial officials at Gortyn. Each judge and each κόσμος as well had his remembrancer or recorder (μνάμων).[6] The duties of these officials consisted in recording the judgment of the official under whom they served. In one instance, in the case of the death of a man who was still in debt through defeat in a lawsuit, the testimony of the judge and his recorder regarding the outcome of that suit aided the creditor in recovering the amount of the debt from heirs of the deceased.[7] This case has given rise to the view that there were no written records, but that the judge and his recorder served as oral witnesses of what had taken place. By paying the money due the repudiated child the recorder of the κόσμος ξένιος became a witness both to the fact of the repudiation and to the

[1] Gilbert, *op. cit.* pp. 46, 81.
[2] Diodorus xii. 20.
[3] Aristotle, *Politics* 1297 a 23.
[4] Strabo vi. 260.
[5] Polybius xii. 16.
[6] Gortyn Code, xi. 16; ix. 32; Ziebarth, *op. cit.* pp. 32, 33, ii.
[7] Gortyn Code, ix. 31 ff.

payment.[1] Another obscure group of judicial officials is mentioned in one instance as enforcing the penalty.[2]

One very short and very fragmentary inscription furnishes the sole indisputable evidence for the existence of private arbitrators at Gortyn.[3]

> —ν θύκοι τοῖς ἐπιτράπονσι
> ἢ ὦι κ' ἐπιτράπωντι, μηδατέρο-
> νς καταβλαπέθαι. Ἢ δέ κα παρ-
> ίωντι καὶ καθ' ἐνὸς γένωντ-
> αι, ἐδδικακσάτω ἐν ταῖς τρι-
> σὶ ἀμέραις. Αἰ δέ κα μὴ ἐδδι-
> κάκσηι, αὐτὸν ἀτήθαι ὦι κ' ἐπιτ-
> ράπωντι τὸ κρήιος ὑπὸ τῶι με-
> μπομένωι. Αἰ δέ κ' ἀμποτέροι ο-
> ἱ μωλιομένοι ἐπιτράπωντι, ὑ-
> π' ἀμποτέροις.

The arbitrator is designated by the formula ὦι κ' ἐπιτράπωντι. Sometimes he was chosen by one of the parties and accepted by the other later, or the two might choose him by common agreement. He was allowed three days in which to render his decision. If he had not reached the decision at the expiration of that time he was punished by a fine equal to the amount in dispute. Apparently if only one of the parties had demanded an arbitrator he received the entire benefit of the fine. If both made the demand both shared in the fine.

The judicial machinery at Gortyn was then very simple. There were κόσμοι, magistrates with judicial functions, δικασταί appointed

[1] Gortyn Code, xi. 14 ff.

[2] οἱ τῖται. Cf. Ziebarth, *op. cit.* p. 33. i.

[3] Dareste, Haussoullier, Reinach, *Recueil des inscriptions juridiques grecques*, p. 400; cf. p.430. In a fragment very difficult to interpret Halbherr claimed to have found a reference to arbitrators (*American Journal of Archaeology* 1897, pp. 213-14). The case deals with sequestration of property in consequence of defeat in a lawsuit. Sequestration is made of the property of the wrong man who brings action to recover the property: καλῆν δ' ἀντὶ μαιτύρον δυδν πρότριτον τὸν [ἐνεκυράκ]σαντα μετρεσιόμενον. αἰ δέ κα μὲ εἶει καλίοντι ἃι ἔγρατται, αὐτὸς μετρέθο τε καὶ προπονέτω προτέταρτον ἀντὶ μαιτύρον δυδν παρῆμεν ἐνς ἀγοράν. (Published by Ziebarth, *op. cit.* p. 36). Halbherr advances the theory (suggested to him by Comparetti) that the party who does the summoning is an arbiter or διαιτητής. It may just as well refer to the party from whom the seizure has been wrongfully made, three men only being involved instead of four, as Halbherr asserts. The passage furnishes very slight evidence on which to base any theory as there are so many lacunae which cannot be filled satisfactorily.

for purely judicial purposes, μνάμονες, one for each magistrate or judge, arbitrators chosen by the parties themselves, and τίται who executed the penalty awarded by the judge. The absence of popular juries simplified the system greatly, but seemingly placed large powers in the hands of one man in cases where the course which the judge should take was not specified by law.

CHAPTER III

Procedure in Criminal and Civil Suits

The modern division of suits into civil and criminal was unknown in Attic law. Bishop defines a crime as "any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name."[1] Austin insists that the sole distinction lies in the procedure.[2] The plaintiff is always the government—the sovereign in Great Britain, the people in the United States. In both cases the action is initiated by a judicial officer specially appointed or elected for the purpose. Anyone who has knowledge of an alleged crime may lay the information, but he is not responsible for the prosecution except in so far as he may be required to give evidence.

In Athens suits were divided into public (γραφαί) and private (δίκαι) suits. The distinction between the two is chiefly in the procedure. A private action, whether *ex delicto* or *ex contractu*, could be instituted and carried on only by the person interested or his representatives. A public action could be prosecuted by any citizen. The Athenian government did not take action in its own name or appoint officials to act as public prosecutors. There is no indication that any different practice prevailed in other Greek judicial systems. A peculiar feature of the Athenian system is that homicide cases were always regarded as private suits. Only a relative of the victim could prosecute a murderer.

The few notices that have been preserved of the codes of the earlier lawgivers furnish rather scanty information about the conduct of a trial.[3] The Gortyn code,[4] however, affords many interesting

[1] *Criminal Law*, p. 32.

[2] *Jurisprudence*, p. 17.

[3] For a general discussion of these codes, cf. Gertrude Smith, "Early Greek Codes," *C. P.* xvii. pp. 187 ff.

[4] Collitz-Bechtel, *SGDI* 4991; Comparetti, *Monumenti Antichi* iii. pp. 93 ff.; Dareste, Haussoullier, Reinach, *Recueil des inscriptions juridiques grecques*, I. pp. 352 ff.; Michel, *Recueil d'inscriptions grecques*, 1333; Solmsen, *Inscriptiones Graecae ad inlustrandos dialectos selectae*, 30; Kohler and Ziebarth, *Stadtrecht von Gortyn*; Buck, *Greek Dialects*, pp. 261 ff.

The code of Gortyn belongs to the fifth century. But Crete, like Sparta, is a type of arrested development. The social and political organization of the cities

details which make it possible to form a fairly complete picture of a trial.[1] All freemen were competent to bring suit as a general rule.[2] There were certain conditions, however, which might prevent a freeman from instituting an action in court. A man holding the office of κόσμος could neither sue nor be sued during his term of office.[3] If for any reason a freeman was in the possession of another, he was viewed for the time being as a slave and could not bring suit. The possessor had to act in his behalf. For example, if a man had mortgaged his person, the mortgagee had to bring suit if the man was injured.[4] If the mortgagee failed to do so then the matter dropped until the man had redeemed himself, when he was again competent to bring his own suit. This must have been the case also with the ransomed man who remained in the possession of his ransomer until he repaid the ransom.[5] Freedmen apparently had equal rights with freemen in the matter of starting an action in court.[6] A slave was not a competent party to a suit. There are many examples of the action

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abounded in archaic survivals even in the age of Ephorus and Aristotle. The code seems to be a restatement, with additions and amendments, of articles and chapters of a prior code. So, in point of development, there is justification for comparing it with the legal system of Athens in the seventh and sixth centuries. It is noteworthy that there is no mention of homicide. It may be suggested that another portion of the code not now extant, dealt with this subject. Or, possibly, self-help in homicide was still practiced and the state had not yet assumed control.

[1] According to the Gortyn code certain matters which now require judicial action were settled out of court. A proclamation before the assembly seems to have served the same purpose in certain cases as court action at the present time. An example is the procedure in adoption. The adoptive father proclaimed the adoption in the agora before an assembly of citizens from a certain stone set up as a speaker's platform. This act was followed by a sacrifice and a libation, the formal means of introducing the new son into the tribe (x. 33 ff.). Cf. the sacrifice to Zeus Phratrios at Athens. Apparently no action was taken by the assembly. The mere publicity of the act served to confirm it. In the same manner if the adoptive father wished to renounce the adopted child public proclamation was the required procedure. To complete the renunciation, however, a payment of ten staters to the child was required. This was done through the courts.

[2] A man obtained full rights of citizenship on attaining the age of eighteen, although before that time he might marry (vii. 35) and be a witness (ix. 45). Cf. Kohler and Ziebarth, *op. cit.* pp. 56 ff.

[3] i. 50 ff.

[4] Ziebarth, *op. cit.* p. 30. vi.

[5] vi. 46 ff.

[6] Ziebarth, p. 33. i. καταϝοικίδεθαι Λατόσιον ἐπὶ τᾶι ϝίσϝαι καὶ τᾶι ὁμοίαι. Cf. Dareste, *op. cit.* p. 421.

of a master in behalf of his slave. If a mortgaged slave was injured the mortgagor and the mortgagee could bring suit either jointly or severally.[1] In like manner, if the slave was responsible for an injury, suit was brought against the mortgagee, if it was committed according to his orders; but if it was committed on the slave's own initiative the original owner was responsible. Likewise if a newly purchased slave had committed a wrong his new owner was responsible unless he repudiated the purchase within a given time.[2] By implication if he did repudiate the purchase the former master became responsible. Again, if a slave was caught in adultery it was to his master that a demand was made for his ransom.[3] A slave girl violated by her own master might herself take an evidentiary oath that she had been so violated.[4] This case is easily explained by the fact that the master who would normally bring suit for her was himself the offender so that she was left without a legal representative.

In general a male relative brought suit for a woman and defended her in court. For instance, if a bridegroom elect refused to marry an heiress, her relatives brought the matter into court, not the girl herself.[5] If someone married the heiress contrary to law, her relatives brought suit.[6] In this case, however, the marriage might take place with the consent of the woman, so that the relatives were really the injured persons. If rape was committed on a free woman her relatives brought action.[7] In view of all these cases, then, it seems certain that a woman was always represented in court by a male relative or guardian. The unmarried woman was under the care of a blood relation or a guardian. The representative of a married woman was her husband, of a divorced woman her relatives. Her status reverted to that of the unmarried woman. An exception similar to the case of the slave girl occurs when a divorced woman was ordered to take an evidentiary oath.[8]

[1] Ziebarth, p. 34, iii.

[2] vii. 10.

[3] ii. 32.

[4] ii. 15 ff. Cf. *infra*, p. 56.

[5] vii. 43 ff. Likewise if there was no groom elect the relatives offered the heiress to the tribe.

[6] viii. 55 ff.

[7] ii. 16 ff. Cf. Buck, *op. cit.* and Ziebarth, *op. cit.* on this passage.

[8] Cf. ii. 45 ff.; iii. 1 ff.; iii. 46 ff. The evidentiary oath was really a form of trial and so differs from the oath in Athenian practice, which was not required by law, but was taken as the result of a challenge.

The scanty remains of the codes of the other lawgivers afford no information about the parties to a suit. But it is inconceivable that those of them at least who legislated for democracies were not fully as liberal as the Gortynian legislator.

In many cases the law determined whether an action could be brought or not. In certain cases action was barred by the fact that the matter antedated the new law which was expressly declared not to be retroactive. Such specification is frequently made when the new law supersedes some provision of the former law.[1] Certain offences were expressly designated as matters for litigation (ἔνδικον ἔμεν). This expression is used in several cases involving unlawful retention of property by a widow. For instance, if a widow on remarrying carried off property which belonged to her children they might lay claim to this property before a court.[2] On the other hand, failure to perform certain required processual acts might debar a man from bringing suit. For instance, if a domestic animal belonging to one man was injured by that belonging to another, the plaintiff had no right to bring suit unless he could produce the injured animal or at least show where it was.[3] In one case a lawsuit is expressly forbidden, when a funeral procession crossed through a man's land in case there was no open road.[4] In other cases the plaintiff's right to bring action, if questioned, was determined after the action was begun. This is shown by the case of fugitive or injured animals.[5] If the animal was not produced or its hiding place pointed out the plaintiff had no right of action. So he summoned two men to witness his compliance with these formalities. If the defendant objected that he had not complied, the two witnesses and their oath proved the right of the plaintiff to sue.

The Gortyn code in some cases forbids self-help preliminary to a trial, i.e. before a man brought suit he was forbidden to seize the person, either slave or freeman, who was the object of dispute.[6] Anyone might offer asylum to a person so seized. If such a seizure was made, a sort of preliminary trial was held which dealt merely with the seizure and had nothing whatever to do with the main

[1] xii. 18; xi. 19; ix. 17; vi. 24; v. 8.
[2] iii. 22. Cf. iii. 30 ff.; iii. 43; x. 24. μὲδὲν ἐς κρέος ἔμεν τὰν δόσιν.
[3] Ziebarth, p. 28, i. Cf. iii. 32; i. 13.
[4] Ziebarth, p. 35. iv. 10.
[5] Ziebarth, p. 28. i.
[6] i. 3 ff.

issue, which would be settled by a subsequent trial after the question of wrongful seizure had been duly settled. At this preliminary action it was decided whether the man accused of making the seizure had made it and a fine was imposed if he was found guilty. Then he was ordered to release the man. Afterward the trial dealing with the original issue was begun. The laws of Zaleucus on the other hand permitted self-help. The man from whom a slave had been taken was allowed to recover him and hold him until the trial took place. *κελεύειν γὰρ τὸν Ζαλεύκου νόμον τοῦτον δεῖν κρατεῖν τῶν ἀμφισβητουμένων ἕως τῆς κρίσεως παρ' οὗ τὴν ἀγωγὴν συμβαίνει γίνεσθαι.*[1] But after taking him back the party was required to bring him before the magistrate and to declare that he was entitled to be the *κύριος* of the slave, giving pledges in confirmation of his statement.

It was the prevailing practice in Greek communities to allow a husband to kill on the spot a man whom he caught in adultery with his wife.[2] An old law of Tenedos provided that the adulterer might be thus dealt with. *Νόμον δέ τινά φασι τῶν βασιλέων Τενεδίοις θέσθαι εἴ τις λάβοι μοιχὸν ἀποκτεῖναι τοῦτον πελέκει.*[3] According to the Gortyn legislator, however, a man who surprised another in adultery with his wife had to notify the relatives of the adulterer and give them an opportunity to ransom him. If after proper notification they refused to ransom him the aggrieved husband was permitted to deal with him as he chose.[4]

At Gortyn the court before which a case was to come was regularly specified by law, as is indicated by the clause *μολὲν ὅπε κ' ἰπιβάλλει πὰρ τôι δικαστâι ἔ ϝεκάστō ἔγρατται.*[5] Occasionally a limitation of time is set within which the action had to be brought.[6] In case a suit was brought against a man who had died in debt the trial could not be held later than a year from the date of his death.[7] In one case a trial by evidentiary oath is ordered within twenty days after the judge had decided that the oath should be taken.[8] The time of the oath was further determined by the fact that four days before it was

[1] Polybius xii. 16.

[2] Cf. Egon Weiss, *Griechisches Privatrecht*, I, p. 11.

[3] Heracl. Pont. 7. For a similar Athenian practice, cf. Lysias i, *passim*.

[4] ii. 28 ff.

[5] vi. 25 ff.

[6] i. 50 ff.

[7] ix. 25 ff.

[8] xi. 46 ff.

taken the plaintiff was required formally to state his charges in the presence of the defendant, the judge and the recorder. The oath of the defendant was sufficient answer to these charges.

Trials at Gortyn took place before a single judge.[1] Since there is no reference to written testimony it seems probable that all evidence was oral.[2] Each litigant appeared accompanied by his witnesses. It is impossible to say how the trial was conducted. There is no indication that there were any formal speeches. In fact, set speeches are not likely before an audience of one. Each party stated his contentions (*τὰ μῶλιόμενα*) confirmed by the declarations of the witnesses (*τὰ ἀποπονιόμενα*). If there were no witnesses and neither party took an oath the case was immediately decided by the judge. The law has the following provision. *τὸν δικαστάν, ὅτι μὲν κατὰ μαίτυρανς ἔγρατται δικάδδεν ἢ ἀπ̔ὄμοτον, δικάδδεν ἃι ἔγρατται, τὸν δ'ἄλλὸν ὀμνύντα κρίνεν πορτὶ τὰ μῶλιόμενα.* "The judge, in whatever it has been written that he shall give judgment according to witnesses or oaths, shall give judgment as has been written, but in other matters he shall take an oath and decide according to the contentions."[3] According to this passage there were two types of procedure. Of these two the *δικάζειν* procedure could be employed only when it was especially enjoined by the law. In every other case the procedure *ὀμνύντα κρίνειν* had to be used. In *δικάζειν* one of two things was indispensable—either witnesses or an oath were required in accordance with which the judge gave his decision. The two types of procedure were not alternative. The choice between them was determined entirely by the nature of the evidence. Both might be used in the same trial. For instance, the *δικάζειν* procedure might be used to clear up some questions which demanded formal proof, but something else might remain to be determined for which the other procedure would be necessary. In many cases, however, the main issue might be decided by the *δικάζειν* procedure, that is, when the case needed only the testimony of processual witnesses.[4]

[1] The laws of Charondas provided for courts of judges (Aristotle *Politics* 1297A). They must have been similar to the Athenian popular juries. *περὶ τὰ δικαστήρια τοῖς μὲν εὐπόροις εἶναι ζημίαν, ἂν μὴ δικάζωσι τοῖς δ' ἀπόροις ἄδειαν, ἢ τοῖς μὲν μεγάλην τοῖς δὲ μικράν, ὥσπερ ἐν τοῖς Χαρώνδου νόμοις.*

[2] Cf. i. 11 ff.; ii. 28 ff.; iii. 44 ff.

[3] xi. 26 ff. Headlam's translation, *Journal of Hellenic Studies*, xiii. (1893), p.51.

[4] Cf. Ziebarth, *op. cit.* p. 82; Zitelmann, *op. cit.* p. 68, asserts that there is no trace here of a division into procedure *in iure* and procedure *in iudicio*, a statement to which

The correctness of this statement is proved by an examination of the passages in which δικάζειν[1] and ὀμνύντα κρίνειν occur. The first passage to be mentioned is that in which a bridegroom has failed to marry an heiress according to law. The judge was to decide that he marry her within two months—ὁ δὲ δικαστὰς δικακσάτω ὁπυίεν ἐν τοῖς δυοῖς μῆνσί.[2] If he did not then marry her, she should marry the next in succession, retaining all of her property. Here the decree of the judge is final. If the bridegroom did not comply, he immediately lost all claim to the heiress or her property. So acquiescence or refusal on his part settled the case one way or the other. Again, in case a man died in debt and his creditors brought suit, or in case a creditor died and his heirs brought suit, the judge decided in accordance with sworn testimony. ἢ δ' κ' ἀποφείποντι δικαδδέτω ὀμόσαντα αὐτὸν καὶ τὸνς μαίτυρανς νικὲν τὸ ἀπλόον.[3] Here likewise the decision was final. If the plaintiff and his witnesses took the oath they won the case. If they refused to take it they lost. In two instances mention is made of a judicial decree that a divorced woman take an oath of denial. In the first instance she was accused of carrying off property belonging to her divorced husband. The judge decreed an oath of denial. It may be objected that this action merely created a presumption in favor of the woman and was not final. But its finality is shown by the fact that after she had taken the oath if anyone deprived her of anything he was fined.[4] In all cases in the code the evidentiary oath is always taken as the result of a judicial decree and it always settles the case.

All of these cases, then, are settled by an evidentiary oath which is taken in accordance with the judge's decree. Two further instances of the use of δικάζειν have occasioned some dispute.[5] In the first passage it is decreed that along with the payment of a fine a man surrender the slave whom he has illegally seized before trial. Likewise in the second instance a man has lost a suit regarding a slave and has

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Headlam objects (*op. cit.* p. 50). He compares the two types to the *anakrisis* and the actual trial at Athens. In this lies his mistake. Cf. Dareste, *op. cit.* p. 435.

[1] With this procedure compare the judgment of an arbitrator at Athens ἐπὶ ῥητοῖς, Isocrates xvii. 19. Cf. Lipsius, *op. cit.* p. 225.

[2] vii. 45 ff.

[3] ix. 38 ff.

[4] iii. 6.

[5] i. 5 and i. 27.

failed to surrender him. It is decreed that he release the slave and pay a fine. It will be observed that in neither instance does the action have anything to do with the point at issue for which the trial was originally instituted. They are wholly independent actions. One is a matter which must be settled before the trial can proceed and constitutes a trial in itself. The other is subsequent to the trial of the original issue. Both are final. In neither case do they correspond to *in iure* proceedings at Rome or to *anakrisis* at Athens, for they have nothing whatever to do with the main issue.

In three cases the judge is bidden to decide a matter κατὰ μαίτυρανς. In i.20 he is ordered δικάζειν provided a witness testifies. In ix.30 he is ordered to give judgment (δικαδδέτω) ποτὶ τὰ ἀποπονιόμενα, i.e. according to the declarations. This phrase undoubtedly refers to witnesses since it is the verb regularly used of the testimony of witnesses.[1] In ix.50 the same expression occurs. In these cases then the judge is ordered to give judgment according to the testimony of witnesses, and apparently each time his decision settles the case. It is only when there are no witnesses that the judge himself is to take an oath and decide the case. He never takes an oath and decides either when an evidentiary oath is taken or when there are witnesses, unless there be an equal number on each side.

The procedure ὀμνύντα κρίνειν is used then only in cases in which there is no evidence submitted according to which by law the judge could decide the case. Only one case is mentioned in which this procedure was used when witnesses testified and there they testified on both sides.[2] Two cases occur in which lack of witnesses is distinctly mentioned as a reason for the adoption of this procedure. The following are further examples. The judge is ordered to adopt this procedure if, in case of divorce, the husband denies that he is the cause.[3] Likewise in iii.16 where ὀμόσει is undoubtedly equivalent to ὀμνὺς κρίνει the judge decides under oath the value of property wrongfully taken from a divorced woman. If a man is accused of taking something belonging to an heiress and denies that it is hers the judge is to decide on oath.[4] In a case in which heirs do not wish to divide certain parts of the inherited property the judge is to decide under oath regarding the

[1] Cf. i. 13; i. 19; ii. 19; ix. 45 ff.
[2] i. 23.
[3] iii. 1.
[4] ix. 21.

things in dispute.[1] Again, when a man has been ransomed and there is a dispute as to the amount of the ransom or as to whether the man consented to be ransomed or not, the judge shall decide under oath regarding the matters in dispute (*περτὶ τὰ μολιόμενα*).[2]

If the evidence, then, produced is of such a character that a decision can be based upon it the judge is bidden *δικάζειν*, otherwise *ὀμνύντα κρίνειν*. If there is conclusive evidence the law orders him to give his decision in accordance with it. If the evidence is inconclusive or equally good on both sides some other method of decision must be used. There are then three situations which may arise in the trial of a case. 1. A witness testifies on one side to a contract or formal transaction of some kind. The judge gives his decision on the basis of that evidence. 2. Witnesses testify on both sides. The judge must use his own discretion. 3. No witnesses testify on either side. Here again he must use his own discretion as he has nothing on which to base his decision except the conflicting contentions of the parties.

An examination of the various passages dealing with witnesses is necessary to show their exact character. In general the examples of witnesses furnished by the Gortyn code are clear cases of witnesses who testify to the performance of some formal or processual act.[3] There are only two cases in which the witnesses could possibly be accidental witnesses to the fact and here they are not necessarily so. If a man violates a woman who is in the charge of a relative he is to pay a fine, if a witness testifies.[4] The possibilities are three. He may be an accidental witness to the fact. He may be a witness to the right of the relative to act in behalf of the woman. Headlam interprets the passage in this way, saying that the witness cannot be a witness to prove the wrong done since none has been required in the preceding cases of violation. But in the following case, that of a man caught in adultery, witnesses are taken by the captor to be present at the capture of the adulterer.[5] The same may be the case here, that is, it is a case of a precautionary witness taken by the relative to witness his capture of the man.

[1] v. 43.

[2] vi. 53.

[3] Cf. Headlam, *op. cit.* p. 59; Dareste, *op. cit.* p. 433, n. 1; Zitelmann, *op. cit.* pp. 75 ff.; Ziebarth, *op. cit.* p. 84.

[4] ii. 16 ff.

[5] For a full discussion of the passage cf. *infra*, p. 70.

The second case deals with the seizure before the trial of a slave whose ownership is in dispute.[1] If the defendant makes denial of the seizure the judge is to decide on oath, unless a witness testifies. Again, the possibilities are three. He may be an accidental witness; he may be a witness of the defendant to prove that he got possession of the slave, not by seizure, but by sale, exchange or as surety. Headlam adopts this explanation on the ground that he could not be a precautionary witness of the plaintiff summoned when the plaintiff saw the slave being carried off. In view, however, of the seduction and adultery cases mentioned above, this seems to be a very plausible explanation. If it is correct the witness testifies to the main point at issue, namely, the seizure of the slave, and his testimony settles the case just as the witness in the case of seduction would testify to the seduction and settle the case. Likewise in the adultery case the witnesses who give their testimony as oathhelpers testify to the question at issue, i.e. whether the defendant was caught in adultery or by means of a plot. In like manner if a man accuses his divorced wife of not bringing their child to him in the way specified by law, the testimony of the witnesses who took the child settles the case. They take an evidentiary oath along with the relatives that the child was taken in the proper manner.[2]

In many cases the evidence of the witnesses has the effect of a written contract or receipt and settles the point of the case for which they were called with the same finality as such a document would. This may not be the final point at issue, but at the same time may be of such a character as to permit the judge to decide the case without further testimony. For instance, a man after catching another in adultery with his wife had to demand of the family of the adulterer in the presence of witnesses a ransom.[3] If the family refused the captor had the right to put the adulterer to death if he really was an adulterer. The relatives of the adulterer might accuse the captor of murder, contending that they refused to pay a ransom because he had been entrapped. The formal witnesses then would be called to give evidence to the fact that the ransom was demanded in the proper way. Likewise, if a man defeated in a suit regarding a slave failed to release the slave because he had fled to a temple for refuge his opponent might accuse him of failing to deliver the slave. If the defendant

[1] i. 13 ff.
[2] iii. 44 ff.
[3] ii. 28 ff.

was prudent he pointed out the slave in the temple in the presence of witnesses.[1] These witnesses might be called to testify to this formality, but their evidence did not apply to the main point at issue —the failure to give up the slave. They merely testify to the fact that the slave was pointed out in sanctuary, thus indirectly proving the defendant's inability to deliver him. Hence further proceedings were impossible. Witnesses were used in similar fashion to point out injured or dead animals.[2] When the ownership of a slave was in dispute if a witness testified the case was settled by his testimony.[3] His testimony would not be to the present ownership of the slave, but to some former contract by which the slave passed into the possession of one or the other of the two contending parties. If the other party could produce no evidence to show that the slave had passed into his possession the testimony of this one witness settled the case. In case a man died in debt a suit was brought to determine the right of his creditors to collect the debt from his heirs.[4] There might be two elements in the testimony presented here. Witnesses might be brought to testify to the liability for the debt or they might testify to the right of the plaintiffs to bring the suit, i. e. that the defendants were actually the heirs of the deceased. If witnesses are produced on both of these points the judge can decide in only one way.

In some cases, however, the evidence merely clears up some preliminary situation without affecting the matter in dispute. For instance, a case in point is where witnesses testify in regard to the sale of a man already deposited in trust. Their testimony is obviously in regard to the earlier transaction.[5] So likewise with regard to witnesses present at the division of property.[6] In a subsequent trial their testimony might be used to give title to a piece of property.

There are two kinds of oaths mentioned aside from the oath of the judge, namely, the oath of the parties and the oaths of the witnesses. The only oath which the party ever takes is the evidentiary oath and the only oath which the witness ever takes is one in conjunction with the party. Presumably a witness could always be called upon to take an oath, but only in certain cases was an oath demanded from him.[7]

[1] i. 38 ff.
[2] Ziebarth, *op. cit.* p. 28.
[3] i. 14.
[4] ix. 24 ff.
[5] x. 25 ff.
[6] v. 51 ff.
[7] Cf. *infra*, pp. 67 ff.

Perjury is not mentioned in the Gortyn code. But Charondas the lawgiver of Catana is said to have been the first to institute an action against perjury. Aristotle calls the ἐπίσκηψις the only noteworthy thing about Charondas' legislation. Χαρώνδου δ' οὐδέν ἐστιν ἴδιον πλὴν αἱ δίκαι τῶν ψευδομαρτυριῶν (πρῶτος γὰρ ἐποίησε τὴν ἐπίσκηψιν).[1] A party to a suit who believed that a witness or his opponent himself had taken a false oath could bring a suit for perjury against him after the trial was over.[2] It is tempting to suggest that this action was instituted as a means of protection against the false evidentiary oath. It may be objected that the evidentiary oath was final in Athens when taken in answer to a challenge even in the fourth century. This is true. But there the challenger voluntarily challenged and agreed to accept the oath as final. An entirely different situation arises when the law orders an evidentiary oath for certain cases as at Gortyn. It can easily be seen that the oath might be abused and that many, not fearing to take a false oath, would take it for the sake of securing an acquittal. In these cases the other litigant is not allowed to be heard at all in his own defence and the procedure may become very unjust. It may be supposed that Charondas, to remedy this situation, instituted the ἐπίσκηψις. This procedure was extended to all cases of false oaths. A perjury trial would involve the facts in the case and in effect would amount to a retrial of the case on its merits.

As a general rule any freeman had the right to bring suit in his own behalf or in behalf of those under his protection. Women and slaves were not competent parties to a suit. Self-help was recognized by the codes in some cases and forbidden in others. In general the trial was before a single judge who might be either a regular magistrate or a specially appointed judicial officer. There were two types of procedure. Where there was a preponderance of evidence he was obliged to decide in accordance with it. Otherwise he had to use his own discretion and give his decision under oath. In one instance large juries, attendance upon which was compulsory, were provided for. Witnesses were for the most part evidentiary. An oath was not always required. All evidence was oral. The evidentiary oath was employed as a form of trial both with and without oathhelpers. Charondas was the first to provide for the prosecution of persons suspected of perjury.

[1] *Politics* 1274 b 5 ff.

[2] For the Athenian practice, cf. Bonner, *Evidence in Athenian Courts*, p. 89.

CHAPTER IV

Procedure in the Athenian Homicide Courts

The laws of Draco dealing with homicide, as they are found in the redaction of 409/8 B.C., constitute the main source of our information regarding practice and procedure in Athenian homicide courts during, and previous to, the time of Draco. The stone is badly mutilated; but with the aid of passages in Demosthenes[1] a tolerably certain restoration of the major part of the inscription has been achieved.[2] The sections of the code dealing with unpremeditated and justifiable homicide, as restored, are so complete that the procedure can be followed from accusation to verdict.

The first step in a trial for unpremeditated homicide was a public proclamation in the agora forbidding the accused to frequent the market place and temples. The purpose of this interdict was to protect from pollution all public places and all religious ceremonies. The proclamation was made by the king archon at the instance of a near relative of the deceased. The code makes no mention of the king archon in this connection, but Aristotle says expressly that he made the proclamation.[3] In view of the conservative character of the procedure in the homicide courts it is quite likely that Aristotle is right even for the earlier period. The silence of the code on the subject is to be explained by the fact that the king archon in pre-Draconian times was in the habit of making this and similar proclamations regarding polluted persons.[4] It was essential then to

[1] xxiii. 28. 37. 44. 51. 53. 60; xliii. 57.

[2] *CIA* I. 61; Dareste, *op. cit.* ii. 1 (no. 21); Michel, *op. cit.* 78; Dittenberger, *Sylloge* 52; Roberts-Gardner, *Introduction to Greek Epigraphy*, ii. 25; Köhler, *Hermes* ii. p. 27; Philippi, *Jahrb. f. Phil.* cv. p. 577; *Der Areopag und die Epheten*, pp. 333 ff.; Hicks and Hill, *Greek Historical Inscriptions*, no. 78; Bergk, *Philologus* xxxii. p. 669; Ziehen, *Rhein. Mus.* 1899, pp. 321 ff.; Ledl, *Wiener Studien*, xxxiii, pp. 1 ff. Cf. Treston, *op. cit.* pp. 192 ff. For the following discussion Köhler's restoration is employed although variant restorations are examined and discussed.

[3] *Ath. Pol.* lvii. 2. καὶ ὁ προαγορεύων εἴργεσθαι τῶν νομίμων οὗτός (ὁ βασιλεύς) ἐστιν. Pollux, viii. 90, doubtless drew his account from Aristotle. προαγορεύει (ὁ βασιλεύς) δὲ τοῖς ἐν αἰτίᾳ ἀπέχεσθαι μυστηρίων καὶ τῶν ἄλλων νομίμων. Philippi who wrote before the discovery of Aristotle's treatise rejects the statement of Pollux, explaining it on the ground that the relatives could make the proclamation only on the order of the king archon after they had laid the charge before him.

[4] Cf. Gertrude Smith, "Early Greek Codes", *C. P.* xvii. pp. 192 f.

indicate only the persons entitled to initiate the proceedings. The interdict was omitted because, no doubt, it was an ancient and well-known formula. Its general purport is found in several passages.[1]

The exact degree of relationship of those who were permitted to initiate proceedings has been a matter of some dispute. [*προειπεῖν δὲ τῶι*] *κτεί*[*ναντι ἐν ἀ*]*γορ*[*âι, ἐντ*]*ὸ*[*ς ἀνεφσιότητος καὶ ἀνεφσιοῦ*. But the interpretation of Lipsius seems the most plausible. On the basis of a passage of Demosthenes,[2] *ἐὰν δὲ μηδετέρωθεν ἦ ἐντὸς τούτων*, he asserts that *ἐντός* may mean 'up to and including.' *ἐντός* in this case is equivalent to *μέχρι* in the phrase preceding, *ἐὰν δὲ μὴ ὦσι πρὸς πατρὸς μέχρι ἀνεψιῶν παίδων*. Wyse has conclusively shown that *μέχρι* may, and sometimes must, mean 'up to and including.'[3] Those who participated in the accusation, then, were father, brother, son, the children of brothers and sisters, uncles and first cousins. The addition of the concrete *ἀνεφσιοῦ* after *ἀνεφσιότητος* is intended to restrict definitely the meaning of the abstract *ἀνεφσιότης* which might easily be understood in a wider sense than the relationship of first cousin. While participation in the initial accusation was narrowly restricted all relatives and even members of the phratry joined freely in the prosecution. *συνδιώκειν δὲ καὶ ἀνεφσιοὺς καὶ ἀνεφσιῶν παῖδας καὶ γαμβροὺς καὶ πενθεροὺς καὶ φράτορας*.

The interdict was followed by the preliminary investigation in which "the kings"[4] decided *prima facie* on the kind of murder which had been committed, thus determining before which court the trial should take place, *δικάζειν δὲ τοὺς βασιλέας αἰτιῶν φόνου*.[5] It is known that in later times three investigations were made in three successive months and the case was finally tried on the last three days of the fourth month.[6] At the actual trial the fifty-one ephetae served

[1] Demosthenes xx. 158. *χέρνιβος εἰργεσθαι τὸν ἀνδρόφονον, σπονδῶν, κρατήρων, ἱερῶν, ἀγορᾶς*. Cf. Pollux, viii. 66.

[2] xliii. 51. Lipsius, *op. cit.*, p. 557; *Jahresbericht über die Fortschritte der klassischen Altertumswissenschaft*, xv. p. 291.

[3] *The Speeches of Isaeus*, p. 568. Philippi contends that *ἐντός* can mean only 'within the circle of' or 'up to and not including' and that the second of these two meanings must be accepted for this passage (*Der Areopag*, pp. 70 ff.). Busolt, *op. cit.* ii. p. 230, agrees with his conclusions. Dareste also accepts his view. Cf. DeSanctis, *op. cit.* p. 181.

[4] By "the kings" are to be understood the king archons in succession. Cf. *supra*, p. 23.

[5] ll. 11 ff. Cf. Philippi, *op. cit.* p. 85.

[6] Antiphon vi. 42; Pollux viii. 117.

as judges, *τοὺς ἐφέτας διαγνῶναι.*[1] Draco does not specify the place of the trial, but unquestionably it was the Palladium, just as it was in later times. *τῶν δ' ἀκουσίων καὶ βουλεύσεως, κἂν οἰκέτην ἀποκτείνῃ τις ἢ μέτοικον ἢ ξένον οἱ ἐπὶ Παλλαδίῳ.*[2] Banishment for an indeterminate period was the penalty for unpremeditated homicide. The person banished had to keep away not only from Attica, but also from pan-Hellenic gatherings, *ἄθλων καὶ ἱερῶν.* Under certain conditions the exile could be terminated.[3] If the deceased had a father or a brother or a son they might readmit the murderer to the country provided that all of them agreed on the pardon. But if there were no such relatives the circle was widened to include first cousins. Again, the consent of all was necessary to make the pardon effective. There was a further provision, namely, that the relatives were required to take an oath. The nature of the oath is not specified, doubtless because it was an oath which had long been in use. It is obviously intended to substantiate the claims to relationship with the deceased,[4] as is shown by the fact that it was not required of the phratry members who in case the deceased left no relatives at all exercised the pardoning power, *αἴδεσις.*[5] Ten members were chosen *ἀριστίνδην* by the fifty-one ephetae for the purpose of considering a pardon. The provision with regard to the pardon of murderers is made retroactive, granting return from exile on the same terms to those convicted before the enactment of Draco's law as well as after.[6]

So long as a convicted murderer or one accused of murder and interdicted remained in banishment he was protected from violence as was any other Athenian living abroad. If any one killed him he was liable to punishment on returning to Athens. His trial took place before the ephetae. But if a murderer entered his native land, i.e. Attic territory, before his banishment was terminated it was lawful

[1] As to the identity of the ephetae cf. *supra* pp. 16 ff.

[2] Aristotle, *Ath. Pol.* lvii. 3; Demosthenes xxiii. 71; Harpocration, *s. v.* *βουλεύσεως*; Philippi, *op. cit.* pp. 29 ff.

[3] Cf. Demosthenes, xliii. 57.

[4] A similar oath was in later times required of prosecutors in homicide cases, Demosthenes xlvii.72.

[5] *ἐὰν δὲ τούτων μηδ' εἷς ᾖ, κτείνῃ δὲ ἄκων, γνῶσι δὲ οἱ πεντήκοντα καὶ εἷς οἱ ἐφέται ἄκοντα κτεῖναι, ἐσέσθων δέκα οἱ φράτορες ἐὰν ἐθέλωσιν.* Premeditated murder could not, of course, be pardoned even by the relatives. The penalty was death or *ἀειφυγία.*

[6] It is interesting to compare this with the code of Gortyn which is never retroactive. Cf. *supra*, p. 35.

for anyone either to kill him on the spot or to bring him to trial by the summary process known as ἀπαγωγή.[1] In case of conviction death was doubtless the penalty. In such a trial the one who brought him before the court would act as prosecutor. In this process the accused was not tried as a murderer. It was a regular criminal trial, the purpose of which was to protect the citizens from pollution. Accordingly any citizen was qualified to prosecute. Groundless prosecutions were discouraged by the imposition of a fine of a thousand drachmae on a prosecutor who failed to obtain one fifth of the votes.[2]

One of the sections of the law as restored by Köhler on the basis of a law cited in Demosthenes forbids maltreatment or blackmail of a returned murderer. A fine equivalent to double the injury inflicted or the sum extorted was imposed. But this restoration is uncertain. Philippi has suggested quite a different restoration, likewise from Demosthenes.[3] As only two letters are legible it is impossible to decide between these rival restorations. Köhler's interpretation is in accord with later practice.

The next portion of the code deals with justifiable homicide. The specifications in regard to the right of the relatives to accuse and prosecute are not repeated. The first case mentioned is killing in self-defence. [ἐὰν δέ τις ἄρξαντ]α χει[ρ]ῶ[ν ἀδίκων κτείνηι..... "The kings" are to decide on the kind of homicide, that is whether or not it is *prima facie* justifiable homicide in self-defence. The ephetae are to act as judges and decide upon the guilt of the accused in precisely the same manner as in cases of unpremeditated homicide.

The next section has been the subject of much dispute. The only remaining letters are ϵ ελευθ at the end of line 36. Köhler assumed that it dealt with the murder of a slave and restored it thus: καὶ κατὰ ταὐτὰ φόνου δίκας εἶναι δοῦλον κτείναντι ἢ ἐλεύθερον, i.e. the trial would be just the same as that described above. Bergk, however, restored it as a further provision regarding justifiable homicide and this, indeed,

[1] ἀπαγωγή was a process by which a criminal caught in the act might be haled before a magistrate by his captor. A returned murderer caught in Attica might also be taken before the thesmothetae for execution. Demosthenes xxiii. 31 ff. Cf. Gilbert, *op. cit.* p. 387.

[2] Demosthenes, xxiii. 80.

[3] Köhler restores from Demosthenes xxiii. 28. Philippi restores from Demosthenes, *ibid.* 37.51. κατὰ τῶν ἐνδεικνύντ]ων [τοὺς ἀνδροφόνους, ἐάν τις κατίηι ὅποι μὴ ἔχσεστι, δίκας φόνου μὴ εἶνα]ι.

seems plausible and preferable, since the preceding sentence deals with that type of homicide case. *καὶ ἐὰν ἐπὶ δάμαρτι ἢ ἐπὶ παλλάκῃ, ἣν ἂν ἔχῃ ἐπὶ*] *ἐλευθέ*[*ρ*]*οι*[*ις παισὶ ἢ ἐπὶ μητρὶ ἢ ἐπὶ ἀδελφῇ ἢ ἐπὶ θυγατρὶ τιμω*]*ρούμενος κτ*[*είνῃ, τούτων ἕνεκα μὴ φεύγειν κτείναντα.* It is a provision permitting a man to kill an adulterer caught in the act.[1] Dareste rejects this interpretation on the ground that the letter *ε* before *ελευθ* is certain. According to Köhler's restoration this clause is followed by a further provision regarding justifiable homicide, i.e. if a man in self-defence slays another who is robbing him there is no punishment. So the two clauses dealing with justifiable homicide are separated by an entirely different topic. If Köhler's restoration is accepted a preliminary investigation must be assumed to determine whether the murderer acted in self-defence, just as in the case above an official inquiry is necessary to determine who struck the first blow and whether the homicide is justifiable. If Bergk's restoration is accepted, it may be assumed that a trial took place like the one described in Lysias' first oration in defence of a husband who claimed that he slew Eratosthenes in his wife's apartment. Justifiable homicide cases were in later practice tried before the Delphinium and presumably they were tried there in the time of Draco.[2]

The inscription in its present state contains no reference to trials such as took place in the fifth and fourth centuries before the courts of the Prytaneum and in Phreatto. Pausanias, in describing the action taken by the Thasians against the statue of Theagenes which fell on a man with fatal results, attributes the institution of the Prytaneum to Draco who in his homicide laws made the provision that an inanimate object should be cast beyond the borders if it fell on a person and killed him.[3] The so-called amnesty law shows that all of the five Athenian homicide courts were functioning in pre-Solonian times.[4] It has been suggested that the unrestorable lines at the end of the inscription contained references to the two types of trial which would come before the Prytaneum and in Phreatto. It has been

[1] Cf. the Gortyn code ii. 28 ff.

[2] The locality was perhaps originally a matter of accident due to the suppliant's taking refuge in a particular shrine. Cf. *supra*, p. 19.

[3] Pausanias vi. 11. 6. Presumably the courts of the Prytaneum and in Phreatto were conducted in much the same way as in later times. The Prytaneum was chiefly ceremonial (Cf. Hyde, *American Journal of Philology*, xxxviii, pp. 152 ff.) Neither of these courts can have sat very frequently.

[4] Gertrude Smith, *C. P.* xvi. pp. 345 ff.

pointed out that the space is not sufficient for such provisions. In fact the remainder of the inscription is quite incapable of restoration except that the traces of the word μεταποιήσῃ show that the law probably ended with the provision quoted in Demosthenes, ὃς ἂν ἄρχων ἢ ἰδιώτης αἴτιος ᾖ τὸν θεσμὸν συγχυθῆναι τόνδε, ἢ μεταποιήσῃ αὐτὸν ἄτιμον εἶναι καὶ παῖδας καὶ τὰ ἐκείνου.[1]

As this cursory review of the inscription shows premeditated homicide is not mentioned, although Draco is reputed to have been the first to draw a distinction between premeditated, unpremeditated and justifiable homicide. In this connection the introductory words of the code, as it stands, have occasioned much discussion for they are obviously not words which would be used to begin a set of laws, καὶ ἐὰμ μή, κ. τ. λ. One explanation offered is that the laws of Draco contained a provision on premeditated homicide at the beginning. When the laws were copied that provision was placed on a separate stele. If this theory is correct it is necessary to assume that the popular decree, which heads the existing stele, and the axon number were repeated at the beginning of each stele, an assumption which is by no means attractive. Another theory explains the beginning on the supposition that the laws of Draco on premeditated homicide had been superseded by later legislation and hence were no longer in existence. Gilbert contends that in the original laws of Draco a single sentence preceded the present beginning. ἐὰν ἐκ προνοίας κτείνῃ τίς τινα, ἀποθανεῖν (ἢ φεύγειν καὶ τὰ ἐκείνου ἄτιμα εἶναι.[2] The remainder of the paragraph after φεύγειν, then, would refer to the procedure common to both kinds of homicide trial, i.e. the kings decide before which court the case shall go, but the ephetae constitute the membership of the court in both cases. This theory of Gilbert is due to his assumption that during the time of Draco the ephetae judged cases of premeditated murder. But the court of the Areopagus in the time of Draco had jurisdiction in these cases.[3]

It is impossible to find authentic material for a reconstruction of the procedure of the Areopagus in pre-Solonian and pre-Draconian times.[4] Several mythical trials for homicide are represented as being

[1] xxiii. 62.

[2] Gilbert, *Beiträge*, p. 490.

[3] Cf. *supra*, pp. 11 ff.

[4] Before the Areopagus in the fifth and fourth centuries came premeditated murder, wounding with intent, arson and premeditated poisoning resulting in death (Demosthenes xxiii. 22; Aristotle, *Ath. Pol.* lvii. 3; Pollux viii. 117; Philippi, *op. cit.*

held at Athens before a court which sat for the purpose of dealing with such cases. In some of these the parties involved were not Athenians. These stories seem to indicate that in very early times provision was made in Athens for the trial of persons who were charged with murder and that strangers may have been induced by its reputation to submit their cases to this court.[1] It is true that in the case of foreigners the verdict could not be enforced, but the question of jurisdiction is of relatively little importance where the matter is one of religion rather than of law. In all of the myths this court is known as the Areopagus.[2] The account of none of these trials, however, except that of Orestes affords any data regarding practice and procedure. Aeschylus, in his description of this trial in the *Eumenides*, represents Athena as instituting a homicide court at Athens for the purpose of trying Orestes. The common tradition in ancient times placed the scene of the trial on the Areopagus.[3] Aeschylus identifies the new court instituted by Athena with the Areopagus of the historical period. Some modern scholars have refused to accept the tradition and considerable discussion about the scene of the trial has ensued;[4] but the problem has no place in the present study which is wholly limited to procedure. The details given by Aeschylus are not full enough to distinguish the court which he describes from any of the other homicide courts. The proceedings begin with a preliminary investigation conducted by Athena acting as presiding

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pp. 23 ff.). The preliminary investigation was identical with that used in cases of unpremeditated homicide. The accuser swore to his right to prosecute and to the guilt of the defendant, the defendant in his turn, to his innocence (Antiphon v. 11; v. 16; Lysias x. 11; Demosthenes xxiii. 67). Each of the two could make two speeches, after the first of which the defendant was at liberty to go into exile (Demosthenes xxiii. 69; Pollux viii. 117). Equal votes constituted an acquittal (Antiphon v. 51). The king archon took part in the voting after he had divested himself of his magisterial character by taking off his wreath (Aristotle, *Ath. Pol.* lvii. 4; Pollux viii. 90).

[1] Ancient writers attribute to Athens the invention of courts and trials. Cf. Lipsius, Das Attische Recht, p. 3.

[2] Hellanicus, quoted by the scholiast on Euripides, *Orestes* 1648; *Electra* 1258 ff.; Demosthenes xxiii. 66; Pausanias i. 28.5; Parian Marble, *Ep.* 3; Bekker, *Anecdota* i. 444, ll. 7 ff.

[3] Aeschylus, *Eumenides* 687 ff.; Euripides, *Electra* 1258 ff.; *Orestes* 1650; *Iph. Taur.* 961.

[4] Ridgeway, "The True Scene of the Second Act of the *Eumenides* of Aeschylus," *Class. Rev.* xxi. pp. 163 ff. Cf. Verrall, p. 184.

officer and filling the rôle of the king archon in later times.[1] The Erinyes are questioned first. They tell their name and state their accusation against Orestes.

φονεὺς γὰρ εἶναι μητρὸς ἠξιώσατο.

Athena inquires whether there were extenuating circumstances, but the Erinyes evade the question. They object that Orestes will neither take nor tender an evidentiary oath. At this point Athena questions Orestes as to his name and story and his right to be a suppliant. Orestes replies that he is already ceremonially clean since his purification was performed in Apollo's temple at Delphi. Then he describes his act, asking Athena to judge its justifiability. Athena declares herself incapable of deciding the matter alone and determines to choose from the best of her citizens men who shall constitute a permanent tribunal for the trial of homicide.[2] The two parties to the suit are ordered to summon their witnesses and produce their proofs.

At the trial Athena again presides. A herald proclaims the meeting by the blast of a trumpet. While the people are assembling Athena proposes to proclaim the establishment of the new court, but her speech is cut short by the entrance of Apollo. The trial begins and the ordinance is postponed. Apollo testifies to the purification of Orestes at his instance and declares himself responsible for his act. Athena then opens the trial using the regular technical formula εἰσάγω τὴν δίκην. The prosecution represented by the Erinyes is bidden to make the accusation. This consists in questions addressed to Orestes.[3] Orestes lays the guilt upon Apollo, at the same time inquiring why the Erinyes did not pursue his guilty mother. Their sole defence is that she was not of the same blood with the man she murdered. Orestes then calls upon Apollo for his evidence. The god declares that he received from Zeus the oracle directing Orestes to avenge his father. Clytaemnestra deserved to die because of her own guilt. To the Erinyes' objection that Zeus himself put his own father in chains and yet in the case of Orestes considers the death of a father of more importance than that of a mother Apollo replies

[1] *Eumenides* 397 ff.

[2] Euripides, *Orestes* 1650 ff., is at variance with Aeschylus in that he makes the gods act as jurors.

[3] In the fifth and fourth century Athenian law courts a speaker could question his opponent and the judges could interrupt and ask questions of the speaker.

that fetters may be unbound, but spilt blood is irrevocable. He here enters upon his main defence, namely, that the father is the true parent. After this closing plea of the defence Athena gives over the case to the jury and Apollo urges them to remember their oath. At this point the trial is interrupted by the proclamation of Athena's ordinance establishing the court of the Areopagus for all future time. While the voting proceeds the Erinyes and Apollo alternately address the jury in an attempt to win their votes. From a legal standpoint this is entirely irregular. Before the votes are counted Athena declares that her vote is for Orestes since she values the father more highly than the mother, and she adds that Orestes shall be acquitted if the votes are equal.[1]

νικᾷ δ' Ὀρέστης, κἂν ἰσόψηφος κριθῇ.

There has been some discussion on this point, two possibilities being suggested, (1) that if the jury is equally divided, Athena, by her vote, will make a majority in Orestes' favor; (2) that if Athena's vote makes equality, then this equality shall acquit the defendant. The second of these two views seems contradictory to the statement of Aeschylus that the ballots were equally divided.[2]

Aeschylus is a dramatist, not a legal historian. It is therefore not to be supposed that in an antiquarian spirit he sought to reproduce on the stage a pre-Draconian trial.[3] But even if he was satisfied in the main to project back the practice of his own day it was inevitable that he should introduce antique features which would be more or less familiar to a cultured Athenian who had occasion to acquaint himself, as Aeschylus did, with the traditions regarding the Areopagus. The procedure of the court was ritualistic and changes would take place very slowly. The history of homicide courts from Solon to Demosthenes, a period of nearly three centuries, is known, and during this time, although some changes in organization occurred, yet the procedure remained practically the same. Some of the features which can be selected as undoubtedly antique are as follows. The king

[1] Cf. Euripides, *Iph. Taur.* 965; *Electra* 1265 ff.

[2] Verrall, p. xlvi, remarks that from Aeschylus it would naturally be inferred that in his time an Areopagite jury was even in number and that the archon basileus who presided always voted according to Athena's precedent for acquittal so that equality in the votes of the jurors always counted in favor of the defendant.

[3] Verrall, p. xlvi, considers the *Eumenides* a doubtful authority on law and legal history since the real issue of the play is religious, not legal.

archon always presided at murder trials. The preliminary investigation and his presidency went back as far at least as the time of Draco. And if it is true that Draco merely codified existing customary laws and practices the *anakrisis* must have belonged to pre-Draconian procedure. At least it must be as old as the distinction between different kinds of homicide. The evidentiary oath tendered by the Eumenides is an exceedingly ancient institution since it was known in the days of Homer.[1] Out if this grew the oaths of the parties preliminary to a trial. These preliminary oaths are not mentioned by Aeschylus unless *φόνων . . . ὁρκίων* and *ὅρκων περῶντας μηδὲν ἔκδικον φρεσίν*[2] are meant to include them. Aeschylus could assume that his audience would take these oaths for granted. Equality of votes counted as acquittal in the time of the orators and of course in Aeschylus' time, but how far back this can be projected it is impossible to say. From a legal standpoint this is quite a natural procedure because mere equality of votes indicates that the prosecution has not proved its case.

Aeschylus does not reproduce the regular four set speeches of an Athenian murder trial. It is not sufficient explanation to say that they are not suited to the drama. Euripides has shown that set speeches of accusation and defence can be easily managed. It is more likely that Aeschylus is here reproducing the procedure before a magistrate who in pre-Solonian times had final jurisdiction. Each litigant, no doubt, presented his side of the case largely in the form of answers to questions of the magistrates, constantly interrupted and stimulated by protests and questions of his opponent. Aeschylus presents, then, a rather realistic picture of an ancient trial before a single magistrate. In the time of the orators the parties no longer gave evidence except in answer to their opponent's questions in open court. This is a survival of the ancient practice here represented.

The number of Areopagites in the drama, which is usually supposed by commentators to be twelve, is of no importance here. From the fact that Athena declares that she will select a jury for this trial Verrall argues that the Areopagus never sat in full assembly, but that a jury for each trial was selected from the whole group by some responsible official.[3] He finds it inconceivable that all members

[1] Cf. *infra*, p. 55.
[2] ll. 483 and 489.
[3] p. 182.

were compelled to attend each session and equally inconceivable that attendance was left to private inclination. Verrall speaks as if Athena meant to select from an already existing body of jurors, forgetting that she is instituting an entirely new court from her citizen body.

Nothing is known about the procedure in homicide trials at Sparta except that in contrast with Athenian practice they extended over several days.[1] In Cyme the law recognized the evidentiary oath of an accuser with oathhelpers as the procedure to be used in homicide cases. If the prosecutor in a trial for murder could furnish a certain number of oathhelpers he won his case.[2]

[1] Gilbert, *Constitutional Antiquities*, p. 80. According to Euripides' account Orestes was not permitted to flee from Argos, but was held for trial (*Orestes* 46 ff.; 430; 443; 870 ff.). But it must not be supposed that he was attempting to picture an Argive homicide trial. The description is, however, interesting as a picture of a homicide trial before a popular assembly rather than before a court. In the first part of the play, the trial as described by Electra, was to decide on the mode of Orestes' death, not on his guilt. But later in the rather sketchy description of the trial the point at issue is whether he shall suffer the death penalty or not. The Argives apparently gather in full assembly. A herald opens the session. Then in succession come four speeches by different people, two in accusation and two in defence. So far Euripides follows the regular Athenian procedure of four speeches in a murder trial. But at this point Orestes is introduced with a speech in his own behalf. This is entirely irregular.

[2] Aristotle, *Politics* 1269 a 1. For a discussion of this law, cf. *infra*, pp. 65 ff.

CHAPTER V

The Evidentiary Oath and Oathhelpers

(a) The Evidentiary Oath of the Principal.

The evidentiary oath began as a challenge or wager.[1] There are several examples of this early form of the evidentiary oath in Greece. It was known in the Homeric epoch. After the chariot race in the funeral games for Patroclus the second prize was given to Antilochus, who had won by a foul.[2] Thereupon Menelaus protested that the prize was his. At first he asked the chiefs to arbitrate impartially between them (μηδ' ἐπ' ἀρωγῇ), but immediately rejected his own suggestion and challenged Antilochus to an evidentiary oath to the effect that he had not won by a foul. Antilochus refused the oath and without more ado the prize was given to Menelaus. There is a vague reference to this kind of oath in Hesiod.[3] The passage may mean that a man has been deprived of some property by another who takes an oath that he is innocent, thereby perjuring himself. An analogous case is found in the *Hymn to Hermes*.[4] Hermes, on being accused by Apollo of having stolen the latter's cattle, angrily declares that he will take the matter before Zeus and offers to swear that he did not steal them. In this case, however, Apollo apparently refuses to accept the oath and Hermes submits to a regular trial before Zeus. This is an instance of an oath voluntarily offered by the litigant in support of his own contentions.

[1] Bonner, "Administration of Justice in the Age of Homer," *Classical Philology* vi, p. 30; *Evidence in Athenian Courts*, p. 74. This form of trial is found in the primitive stages of many legal systems. It was known in Germanic law (Grimm, *Deutsche Rechtsalterthümer*, ii. 495 ff.), in Anglo-Saxon law it was occasionally allowed (Thayer, *A Preliminary Treatise on Evidence at the Common Law*, pp. 24, 25) and in Massachusetts colony a white man was permitted by law to swear an evidentiary oath in answer to the accusation of an Indian (I. *Prov. Laws Mass.* 151 [1693-94]).

[2] *Iliad* xxiii 582 ff. On the passage cf. Bonner, "Administration of Justice in the Age of Homer," *C. P.* vi. p. 30.

[3] *Works and Days* 193-94.

βλάψει δ' ὁ κακὸς τὸν ἀρείονα φῶτα
μύθοισιν σκολιοῖς ἐνέπων, ἐπὶ δ' ὅρκον ὀμεῖται.

Cf. Bonner, "Administration of Justice in the Age of Hesiod," *C. P.* vii. p. 18.

[4] 324 ff.

Theognis makes several references to the false evidentiary oath, bewailing the faithlessness of mankind. He speaks especially of an evidentiary oath with regard to a deposit of property.[1]

εἰ δ' ἀδίκως παρὰ καιρὸν ἀνὴρ φιλοκέρδει θύμῳ
κτήσεται, εἶθ' ὅρκῳ πὰρ τὸ δίκαιον ἑλών,
αὐτίκα μέν τι φέρειν κέρδος δοκεῖ, ἐς δὲ τελευτὴν
αὖθις ἔγεντο κακόν, θεῶν δ' ὑπερέσχε νοός.

The *Eumenides* of Aeschylus offers another instance of a challenge to an oath which was refused.[2]

Herodotus in two passages refers to the evidentiary oath. A deposit of money was made with Glaucus, a Spartan, a man renowned for his honesty. When the sons of the depositor came to collect the money Glaucus told them that he had no recollection of the transaction. After their departure he consulted the oracle at Delphi, asking if he should swear and so keep the money.[3] This is merely a contemplated oath, but if taken with the consent of the claimants it would have settled the case. The other passage has to do with an oath regarding the identity of a person.[4]

The Gortyn code furnishes several instances of this type of oath. But the party no longer takes the oath on his own initiative or on a challenge from his opponent. The law specifies the cases in which an evidentiary oath shall be taken and which of the two parties in a particular case has the privilege of taking it. Thus the code, which represents a very early stage of legal development, illustrates the growth of a voluntary procedure into a compulsory procedure specified by law for certain types of cases. At some point in this early period, perhaps when the first written laws were established, the lawgiver perceived the value of the evidentiary oath as a form of trial. He thereupon introduced it in his code. The first instance of the oath in the Gortyn code is that of a slave girl violated by her own master. He is the legal representative of the slave girl, but in this case since he has become the culprit she is allowed to institute action

[1] 199 ff. Cf. 1139 ff. and Herodotus vi. 86, discussed *infra*. Cf. also Theognis 283 ff., where there is a general reference to the evidentiary oath.

[2] 429 ff. Cf. Bonner, *Evidence in Athenian Courts*, p. 75; Bréhier, *De Graecorum Judiciorum Origine*, pp. 91 ff.

[3] vi. 86. Cf. Rawlinson's note, *ad loc.* "The Greek law allowed an accused person, with the consent of the accuser, to clear himself of a crime imputed to him by taking an oath that the charge was false."

[4] vi. 68 f.

herself. Her oath decides the matter (ὁρκιωτέραν). If she takes it the master must pay a fine.[1] The next case deals with a divorced woman accused of carrying off some property belonging to her husband. Acknowledgement of the theft involves the payment of a fine. But if she denies it, the court decrees that she take an oath of denial under conditions specified by law. That the oath if taken is final is shown by the fact that various measures are provided to prevent the molestation of her property after she has taken the oath.[2] The defendant in an action to recover a debt when witnesses are lacking is allowed at the demand of the plaintiff to clear himself by one of two methods; the first of these is an evidentiary oath. "but if witnesses did not declare or if he who made the promise ———, let him either take an oath, or ———, whichever the plaintiff chose."[3]

Another type of the evidentiary oath as taken by the principal alone is the oath of the Athenian father to the legitimacy of a son on his introduction into the phratry.[4] This oath created a presumption that the contentions of the father were true, but it was subject to rebuttal, if anyone had doubts about its truth. An analogous oath is that furnished by an inscription from Dyme[5] where citizenship was extended to foreigners of free birth on the payment of a talent to the state. All over seventeen years of age themselves took the oath. But if a man who was applying for citizenship had sons under seventeen, he took the oath that they were his legitimate sons and were under seventeen years of age. When they reached the age of seventeen they became citizens through the strength of that oath.[6]

The next change which is known to have been made in the character of the oath is attributed to Solon, as were so many ancient

[1] ii. 11 ff. Headlam, "The Procedure of the Gortynian Inscription," *Journal of Hellenic Studies* xiii. p. 65, refuses to regard this oath as final. He claims that the accused master was allowed to clear himself by oath or in some other way. But this interpretation does not take account of the word ὁρκιωτέραν. Zitelmann considers the oath final.

[2] iii. 1 ff. Cf. xi. 45 ff. and p. 58 *infra* for details about the taking of the oath.

[3] ix. 51 ff. Headlam's, *op. cit.* p. 55, translation. The dots indicate lacunae.

[4] Isaeus, vii. 16; viii. 19. Cf. Ziebarth, *De iureiurando in iure Graeco quaestiones*, p. 32.

[5] Collitz-Bechtel, *Sammlung der griechischen Dialektinschriften* 1614; cf. Szanto, *Das griechische Bürgerrecht*, pp. 54 and 113 f.

[6] Dareste, Haussoullier, Reinach, *Recueil*, Second Series, vol. i, p. 104, give another example of an evidentiary oath which admitted of rebuttal, in a Calaurian inscription in which an official is ordered to take such an oath.

laws, although it may well belong to an earlier stage of the Athenian legal system.[1] δοξασταί: κριταί εἰσιν οἱ διαγιγνώσκοντες πότερος εὐορκεῖ τῶν κρινομένων, κελεύει γὰρ Σόλων τὸν ἐγκαλούμενον, ἐπειδὰν μήτε συμβόλαια ἔχῃ μήτε μάρτυρας, ὀμνύναι, καὶ τὸν εὐθύνοντα δὲ ὁμοίως. The oath is limited to cases in which there is no other available evidence, but both parties may take it instead of one as in the earlier stages of the institution.[2] By this time it is plain that the evidentiary value of the oath has almost disappeared. It is little more than a formality.

It is extremely probable then that the oath of the parties preliminary to a trial arose from this oath.[3] Originally restricted to certain cases in the law attributed to Solon, the evidentiary oath soon spread to other cases and at last became the normal practice in every form of trial. Plato intimates that the preliminary party oath was derived from the evidentiary oath, or, as he calls it, the oath of Rhadamanthys.[4] This is a very plausible explanation. Each party in both private and public suits after a time took the oath, the plaintiff that the defendant committed the crime, the defendant that he did not. Then the purely evidentiary character of the preliminary oath was lost and it became a mere formality.

The oath was very solemn and was taken with great formality over victims on a blazing altar.[5] The one who swore had to take hold of the altar or he might lay his hand on his child as he took the oath. Always the oath ended with a curse calling down the wrath of the gods upon the swearer and all his race if he swore falsely. The

[1] *Lexica Segueriana*, Bekker, *Anecdota Graeca*, i. 242. Meier-Schömann-Lipsius' *Der attische Process*, p. 898, n. 376, connect this oath definitely with the oath in response to a challenge in later Athenian law.

[2] Gilbert, *Beiträge*, p. 466, suggests that both parties were ready to take the oath and the legislator considered it unfair to give the advantage to one party by the restriction of it to either party.

[3] By the preliminary oath is meant the oath by which at the beginning of a suit each party confirmed his plea.

[4] *Laws* 948 B. Plato objects to the fact that if the party oaths are taken one of the two litigants in every suit is bound to be perjured. Gilbert, *op. cit.* pp. 466 f., apparently accepts the Platonic explanation and Bonner, *op. cit.* pp. 74 f., expressly remarks upon the evidentiary character of the party oath. Philippi, *Der Areopag*, p. 92, suggests that these oaths may not have had to do with the fact itself, but with the conviction of the one who swore. Rohde, *Psyche*, i. 268, n. 2, suggests that the oaths were not juristic, but religious.

[5] For the formalities attendant upon various oaths, see Lasaulx, *Der Eid bei den Griechen* (Erschien zuerst vor dem Würzburger Lectionskatalog für das Sommersemester, 1844), pp. 179 ff.

one who demanded the oath administered it to the swearer who repeated it word for word.[1]

To summarize—the original evidentiary oath began with a wager or challenge. It was a wholly voluntary act. After a time the possibility of using such an oath as a method of procedure was recognized and it was made a regular form of trial by the state, even being compulsory in some cases. If taken where prescribed by law it was final. Later the oath became subject to rebuttal and finally both parties were allowed to swear an evidentiary oath. At length this party oath spread to all cases and became a mere formality.

(b) The Evidentiary Oath of the Principal with Oathhelpers

Compurgation has been treated as an independent institution. But it is really a development of the evidentiary oath and many of its peculiarities become clear only if this fact is recognized. In the various legal systems the evidentiary oath was early felt to be insufficient and it survived in modified forms in only a few instances. In later stages as a rule the oath of the principal had to be supported by auxiliary oaths varying in number according to the matter at issue.[2] This form of trial was especially common in the Middle Ages.[3] In German law the co-swearers were known as Eideshelfer, in English as oathhelpers or compurgators.[4] Under both systems the helper swore merely to his confidence in the principal's oath. It had nothing whatever to do with the fact at issue.[5] Any freeman might wage his

[1] The accuser and the accused before the Areopagus at Athens took a very solemn oath, swearing over the pieces of a boar, a ram and a bull which had to be sacrificed by certain persons on certain days. Their oath was by the Erinyes and the other divinities.

[2] Grimm, *op. cit.* ii. 495 ff. Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, p. 83.

[3] Thayer, *op. cit.* p. 24.

[4] A late Latin word. The institution was quite unknown in Roman law. In English law the institution itself is known as compurgation or wager of law. German law aside from the term Eideshelfer uses the Latin names *consacramentales* and *coniuratores* and designates the institution *Eidhilfe*. The institution was in use in France also in the case of heretics. Cf. DuCange, *Glossarium*, under *compurgator*. The oath was as follows: "Ego talis juro per Deum et haec sancta quattuor Evangelia, quae in manibus meis teneo, me firmiter credere quod talis non fuit Insabbatus, Valdensis, vel Pauperum de Lugduno, neque Haereticus credens errorum erroribus, et credo firmiter eum in hoc jurasse verum."

[5] In both England and Germany oathhelpers were apparently first used in criminal suits, for all of the earliest cases belong to this kind of action. Cf. Grimm, *op. cit.* ii, 491. However, in later times, trial by compurgation was admitted in civil suits, in

law.[1] Slaves, not being competent to take an oath, were consequently not allowed as oathhelpers. It is generally believed that in the earlier stages of the institution a man had as oathhhelpers only his own relatives. Naturally the relatives would be most keenly interested, since the accusation, if not disproved, might cause a feud.[2] It was also a matter of duty.[3] As time went on, however, the right to take the oath was extended to neighbors and friends. Naturally only people who knew the principal well, relatives, neighbors, intimate friends, could be admitted as oathhelpers.[4] It was always a distinctly partisan institution. Oathhelpers had to be of age.[5] As a general rule women could not act as oathhelpers.[6] The rank of an oathhelper might depend on that of his principal, or on that of the person injured, for instance on that of the deceased in a homicide case.[7] In the beginning oathhelpers must always have been on the side of the defendant. It is of course a very natural growth of the

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England surviving chiefly in cases of detinue and debt. In an action of debt, unless the plaintiff relied on a sealed document, the defendant as a rule might wage his law. Cf. Pollock and Maitland, *The History of English Law before the Time of Edward I*, ii. 214. The institution early fell into disuse in criminal suits in England. There from the beginning it was used in both ecclesiastial courts (*ibid.* i. 443) and in the king's courts as an optional form of trial alongside trial by jury. In the fourteenth century a citizen had a choice between the Great Law and a jury of 12 (*ibid.* ii. 634-36). The institution had nearly disappeared by the latter half of the eighteenth century, but as late as 1824 a case appeared in which a debtor demanded compurgation and the practice was not officially discontinued until 1833, when further use of it was forbidden by an Act of Parliament. Cf. Thayer, *op. cit.* In Germany in the Middle Ages compurgation was restricted almost entirely to criminal suits. The oathhelpers in civil suits gradually faded into witnesses who testified from their own knowledge (Schröder, *op. cit.* 715). A case in which Eideshelfer were used in the year 1548 shows that the institution in Germany lasted until the late Mediaeval period.

[1] Only a freeman was capable of paying *Wergeld.* Grimm, *op. cit.* ii. 495 ff. The only exception to the rule that any freeman might be tried by compurgation is found in Salic law where it is stated that only nobles were allowed trial by compurgation, although any freeman could be tried in that way if the plaintiff gave his consent.

[2] Pollock and Maitland, *op. cit.* ii. 600.

[3] Schröder, *op. cit.* p. 70.

[4] *ibid.* p. 83.

[5] Grimm, *op. cit.* ii. 543.

[6] *ibid.* i. 563. There are exceptions to this rule. In the ecclesiastical courts of England a woman strengthened her cause with women oathhelpers. Among certain Germanic peoples also women could support the oath of a litigant, as for example among the Lombards and Burgundians (*ibid.* ii. 495).

[7] *ibid.*

institution that the privilege should eventually be extended to the plaintiff as well,[1] just as in the case of the evidentiary oath of the principal.

The procedure was quite simple. In England when the litigant was permitted to wage his law the court fixed the number of compurgators which he must produce,[2] since the number varied according to the importance of the case.[3] As the institution developed the method of choosing oathhelpers changed. At first the selection lay entirely with the party to the suit,[4] but later they were chosen by the adversary or the judge. But under this later procedure the litigant always retained the right to reject those who were chosen if he could satisfactorily explain his refusal to accept them. The oathhelper, on the other hand, had the right to refuse to take oath if he was unable to reconcile it with his conscience.[5] In the primitive stages of every legal system there is apparent a great fear of committing perjury. Herein consist the safeguards which made the institution a sounder means of proof than it seems to be. When the trial took place the oath was administered to the litigant by the adversary in early times and in later times by the judge. The litigant repeated it word for word. Then the oathhelpers had to swear, at first, it seems, jointly, but in later times singly.[6] By the individual oath it was made to appear a more personal and solemn thing. The content of the oath is much the same in both systems. In English courts they swore "The oath is clean that ——— hath sworn"[7] although it might also

[1] In English law there is no case cited by Thayer or by Pollock and Maitland in which the oathhelpers aid the plaintiff until the later stages of the institution when it had begun to be used in civil suits. Pollock and Maitland, *op. cit.* ii. 634-36. Cf. Grimm, *op. cit.* In Germany also the Eideshelfer seem originally to have aided the defendant exclusively, although later they appear even in homicide cases on the side of the plaintiff. An old law is mentioned by Meister according to which the plaintiff in a homicide trial could with two Eideshelfer swear that the defendant was guilty. Cf. R. M. E. Meister, "Eideshelfer im griechischen Rechte," *Rh. Mus.* lxiii. p. 575, n. 1.

[2] Pollock and Maitland, *op. cit.* ii. 610.

[3] An interesting illustration of this is the different number of oathhelpers required by the 3 laws in London in the 13th century (*ibid.* ii. 634-36). Twelve seems to have been a normal number in both the Germanic and English systems. Cf. *ibid.* ii. 600; Thayer, *op. cit.* p. 90; Schröder, *op. cit.* p. 358. Only rarely was the oath with one helper sufficient (Grimm, *op. cit.* i. 285). Occasionally as many as 300 oathhelpers are found.

[4] Schröder, *op. cit.* pp. 83, 384; Pollock and Maitland, *op. cit.* i. 140.

[5] Schröder, *op. cit.* p. 83; Pollock and Maitland, *op. cit.* i. 140.

[6] Schröder, *op. cit.* p. 354.

[7] Pollock and Maitland, *op. cit.* i. 140.

take a less positive form, i.e. they might swear that the oath was true to the best of their knowledge.[1] In the Germanic system they swore that the oath of the principal was "rein und unmein."[2] So in neither system is an oathhelper ever found who swore to the fact, although there are undeniably cases in which the fact was known. Great emphasis was put upon the form of the oath as sworn by the oathhelper.[3] The compurgator who swore to the innocence of a person who was really guilty was not liable to a charge of perjury. This was, of course, just, since he swore to his own belief, not to the facts of the case which presumably he did not know.

The institution of compurgation in England and Germany was never developed farther than this. The oathhelper never swore to anything except his confidence in the principal. It is true that they appear sometimes on one side of the case, sometimes on the other. It is true also that they must have known the facts on many occasions. But this in no wise changed the character of their oath.

Although the institution was so well known in mediaeval law no one had observed any instances of it in the legal systems of the ancient Greeks until in 1895 Zitelmann[4] declared that he had found some cases of oathhelpers in the great Gortyn inscription. He was followed by various scholars who pointed out additional examples of the institution elsewhere in Greece,[5] and the whole matter was

[1] *Ibid.* ii. 600. Cf. the formula used in London, 13th century: "quod secundum scientiam suam iuramentum quod fecit fidele est." This does not, however, imply any knowledge at all of the fact, i.e. it does not mean that they have positive knowledge that the oath is true, but merely that they know of nothing which makes it untrue.

[2] Schröder, *op. cit.* p. 83; "Die Eideshelfer hatten nicht die objektive Wahrheit, sondern nur die subjektive Reinheit des Haupteides zu beschwören." Cf. Grimm, *op. cit.* ii. 495 ff. and 541: "Eideshelfer schwuren nicht dass eine That wahr sei, sondern dass der, dem sie halfen, einen echten Eid ablege."

[3] At the use of a wrong word the oath "bursts" and the adversary wins. Pollock and Maitland, *op. cit.* ii. 600; Schröder, *op. cit.* p. 358. There are further specifications as to the physical attitude in which an oath must be taken. Often the helper must grasp the arm or shoulder of his principal as he speaks the oath. Grimm. *op. cit.* ii. 551. Cf. ii. 129.

[4] Buecheler and Zitelmann, "Das Recht von Gortyn," *Rh. Mus.* xl, Ergänzungsheft. Commentary by Zitelmann, p. 76.

[5] Ziebarth, *De iureiurando in iure Graeco quaestiones*, pp. 40 f.; article "Eid" in Pauly-Wissowa, p. 2082; Gilbert, *op. cit.* pp. 468 f. (1896); R. Meister, *Berichte der könig. Säch. Gesellschaft der Wissenschaften*, 1896, pp. 35 ff.; Wyse in Whibley, *Companion to Greek Studies* (1916), p. 467; Glotz, *Solidarité de la famille dans le droit criminel en Grèce*, pp. 288 ff.

subjected to a careful study by Meister[1] who collected and discussed all of the previously alleged occurrences of the institution and added a few new examples.

Before examining the various passages adduced by Meister and his predecessors in support of the existence of the institution in Greece it will be well to point out that oathhelpers as a distinct class of witnesses are not mentioned by any Greek author. Nor does any certain technical name for them occur in Greek inscriptions.[2] No definite reference to the institution is found in the Attic orators and the lexicographers who confine themselves to the explanation of what occurs in the orators are silent. Not even Pollux, who devotes his entire eighth book to legal terminology, mentions them. Neither Plato nor Aristotle, who were both versed in legal history, has any designation for them. Aristotle makes the following statement in regard to the different kinds of witnesses.[3] *Εἰσὶ δὲ αἱ μαρτυρίαι αἱ μὲν περὶ αὐτοῦ αἱ δὲ περὶ ἀμφισβητοῦντος καὶ αἱ μὲν περὶ τοῦ πράγματος αἱ δὲ περὶ τοῦ ἤθους, ὥστε φανερὸν ὅτι οὐδέποτ' ἔστιν ἀπορῆσαι μαρτυρίας χρησίμης.* That is, Aristotle makes a division into witnesses of fact and witnesses to character. But although it is generally admitted that the institution of oathhelpers in the German and English sense was unknown in Athenian law, most scholars have accepted the phrase *αἱ μαρτυρίαι περὶ τοῦ ἤθους* as referring to Eideshelfer. But Aristotle is describing the law as it existed in his day. Hence it is not probable that he would discuss an obsolete type of witness. Those who argue that the phrase has reference to oathhelpers use as proof the fact that Aristotle places these witnesses on a par with witnesses of fact (he calls them both *χρησίμη*, that is a decision might be based on the evidence of either), but that German Leumundszeugen, the counterpart of our familiar character witnesses who testify to the general reputation of a defendant, are never on a par with witnesses of

[1] *Rh. Mus.* lxiii (1908), pp. 559 ff. Cf. Cauer's review, *Wochenschrift für klassische Philologie* xxvi, p. 766.

[2] The word *ὀμωμόται* which is preserved in two inscriptions (Collitz-Bechtel, *op. cit.* 4964 and 5092) has often been considered a technical designation for this class of witnesses and *ὀρκομόται* (*ibid.* 4969; Fougères, *Bull. Corr. Hell.* xvi, p. 577) has been interpreted as a variant for *ὀμωμόται*. But all four inscriptions are fragmentary and unintelligible and it is not possible to make any deductions from them alone. Meister rejects *ὀρκομόται* as oathhelpers on the ground that this word is used unmistakeably of jurors in the Oeanthea-Chaleion inscription (*op. cit.* p. 579). The nearest approach to a word for the institution is the verb *συνεκσομόσαθθαι* (Collitz-Bechtel, *op. cit.* 4986).

[3] *Rhetoric* 1376 a 23 ff.

fact. But the analogy with German law is valueless. For English law puts character witnesses on precisely the same plane with witnesses of fact. Furthermore, character evidence, although not quite in the English sense, was well known at Athens and might be admitted even in the Areopagus.[1] It is then inconceivable that Aristotle refers to compurgation which was not known at Athens in his day. That he refers to character evidence is borne out by the following sentence which Meister fails to quote:[2] *εἰ μὴ γὰρ κατὰ τοῦ πράγματος ἢ αὐτῷ ὁμολογουμένης ἢ τῷ ἀμφισβητοῦντι ἐναντίας, ἀλλὰ περὶ τοῦ ἤθους ἢ αὐτοῦ εἰς ἐπιείκειαν ἢ τοῦ ἀμφισβητοῦντος εἰς φαυλότητα.* Obviously there is no indication here of an oath either to a fact or to the truth of another man's oath. The witness, regularly unsworn in Athenian practice, simply testifies to the *ἐπιείκεια* or *φαυλότης* of the party. It is clear then that Aristotle is not only not using a special designation for oathhelpers, but is not even speaking of oathhelpers.

Meister recognized two distinct classes of oathhelpers in Greek law.[3]

1. Those who swore that the principal's oath was good. This class corresponds precisely to compurgation in English and Germanic law as described above.

2. Those who swore the same oath as the principal in support of his contentions. This class is entirely unkown to the English and Germanic systems.

The former class need have no knowledge of the fact; the latter must. The oaths consequently are quite different in content, the common feature being that they join the principal in his preliminary oath in denial or affirmation and that in both cases the oaths are final. The ordinary witness, if sworn at all, had no part in the preliminary oath taken by the litigants, but swore to matters within his knowledge which were considered germane to the issue; frequently he had no knowledge of the main issue—the guilt or innocence of the defendant. Still another factor may be noted. In many cases no witnesses could be found to swear that the defendant did not commit the crime

[1] Bonner, *Evidence in Athenian Courts*, pp. 18 and 83 f.

[2] Sandys translates: "For if we have no evidence as to the fact, either in agreement with our own side of the case or opposed to that of the adverse party, at all events (we shall be sure to find plenty) as to character, . . . to establish, that is, either our own respectability or the opponent's worthlessness."

[3] Meister, *op. cit.* pp. 579 ff.; cf. Zitelmann, *op. cit.* p. 76; Ziebarth, *De iureiurando in iure Graeco quaesiones*, pp. 40 f.

with which he was charged. For example, Euxitheus, the defendant in the Herodes murder trial was the last person seen in company with Herodes.[1] So no one could swear that he was not the murderer.

The problem then is to discover if possible whether class 2 develops from class 1. Although Meister has recognized the two distinct classes in Greek law, he has failed to consider this question in detail, thus confusing his argument.

Of the examples given by Meister there are only two cases of Eideshelfer which correspond to the English and German systems,i.e. relatives who swear to the truth of the defendant's oath. One occurs in an inscription from Egyptian Thebes belonging to the second century B.C.[2] Two brothers, Heracleides and Nechutes, were charged with wounding. They were ordered to take an evidentiary oath to the effect that they themselves did not cause the wound, and did not know who did (this probably means, as Meister suggests, that they were not accomplices). In support of this oath their brothers swear that it is true (*ἀληθῆ τὸν ὅρκον εἶναι*). *ἀληθῆ* is used in the same sense as the German "rein und unmein" and the English "good," that is, it merely expresses the helper's confidence in the principal and implies no knowledge of the facts. The oathhelpers could not have had knowledge of the facts unless the time of the crime was specified and they could prove an alibi for the defendants. This, however, is only incidental. The fact that they swear merely that the oath of the defendants is true proves that they are oathhelpers in the only sense of the term known in German and English law. It is interesting to note that they are the closest relatives of the defendants. Relationship was one of the qualifications for the first type of oathhelper. Apparently the oath of the defendants with their oathhelpers decided the case. If the helpers failed to take it, the defendants were to be brought before the *ἐπιστάτης* (*ἔρχεσθαι ἐπὶ τὸν ἐπιστάτην*) for trial on the merits of the case.

This form of compurgation is illustrated also by a passage from the *Politics* in which Aristotle commenting on the absurdity of ancient laws uses as an illustration a law of Cyme.[3] *ἂν πλῆθός τι παράσχηται μαρτύρων ὁ διώκων τὸν φόνον τῶν αὐτοῦ συγγενῶν, ἔνοχον εἶναι τῷ φόνῳ τὸν*

[1] Antiphon v. 22.

[2] Published by Revillout and Wilcken, *Révue Égyptologique*, vi. p. 11 and again by Wilcken, *Griechische Ostraka aus Aegypten und Nubien*, ii. no. 1150. Cf. Meister, *op. cit.* p. 575.

[3] *Politics* 1269 a 1. Cf. Meister, *op. cit.* pp. 573 ff.

φεύγοντα. The phrase τῶν αὐτοῦ συγγενῶν has generally been construed as dependent upon φόνον and so has been considered to have reference to the universal rule in Greece that only a relative of a murdered man could prosecute the murderer.[1] But if it is joined with πλῆθος μαρτύρων, which is not at all impossible,[2] one of the important characteristics of the original Eideshelfer would be fulfilled. In any case there is no real difficulty in recognizing oathhelpers in the πλῆθός τι μαρτύρων. It may be objected that there is no mention of an oath, the indispensable feature of the institution. But the objection cannot be sustained. For this is a murder trial and at Athens all witnesses in murder trials were sworn so that Aristotle would scarcely think it necessary to mention the oath which his readers would assume. Aristotle describes them as μάρτυρες which seems to show that he did not recognize them as oathhelpers. But if he had realized that he was criticizing the institution of oathhelpers he would not have used the word μάρτυρ, but some circumlocution, since his readers could not have known that he meant oathhelpers. With his knowledge of legal institutions it is remarkable that Aristotle was ignorant of the institution of oathhelpers, but in the face of this passage it is better to admit his ignorance than to make a desperate effort to defend his knowledge.[3] This is what Meister does, thereby weakening his argument.

The fact that stress is put on the quantity also makes for their being oathhelpers. If they were fact witnesses number would be of comparatively little importance. Reliability, not quantity, is the desideratum in testimonial evidence. It is scarcely possible that they could be fact witnesses, for murder is usually committed with the greatest secrecy. The only reason for demanding a certain number of eyewitnesses would be a practice of determining the case without letting the defendant be heard in his own defense. This is just what happens in the case of oathhelpers. If the party produces the required number he wins the case. It is inconceivable that the law required a fixed number of eyewitnesses in order to establish a *prima facie* case. If they are oathhelpers, the passage furnishes an illus-

[1] Glotz, *op. cit.* pp. 47 ff. and 425 ff.

[2] Cf. Jowett's translation of the *Politics*.

[3] Cf. Wyse, *op. cit.*, who says that Aristotle is wrong.

tration of oathhelpers as used on the side of the plaintiff. The number was fixed by the court.[1]

These two cases exhaust the Greek instances of Eideshelfer as they appear in Germanic and English practice. In the other cases cited by Meister and his predecessors the so-called oathhelpers swear not that the oath is good, but they swear the same oath as the principal. In other words, owing to their knowledge of facts they are able to join the principal in a solemn oath. They thus differ fundamentally also from regular witnesses in that the combination oath, like the ancient evidentiary oath, settles the case. The opponent is not allowed to say a word. The unity and finality of the oath indicate a distinct development of oathhelpers unknown to other systems.

Of the cases which belong under this second class, all from the laws of Gortyn, there is one which shows more clearly than the others the transition from class 1 to class 2. It comes from one of the so-called popular decrees.[2] The first part of the inscription is rather obscure and the different persons with whom it deals have been variously interpreted, but the impossibility of filling the lacuna with certainty renders any interpretation a mere guess. Meister turns his attention chiefly to the second part of the inscription, which is much clearer and which apparently deals with a similar situation. In this case A has made a seizure of movable objects from the house in which B supposedly lives. But C who really lives there brings suit to recover his property. He notifies three neighbors, who come and swear with him that the person (B) from whom A meant to take the

[1] Meister cites an excellent analogy in a German law to the effect that a plaintiff in a homicide case could with two oathhelpers swear that the defendant was guilty of a murder. Apparently the verdict was based on this oath and the defendant was not heard in his own defense.

[2] Collitz-Bechtel, *op. cit.* 4986. Meister, *op. cit.* pp. 570 ff.; Halbherr, *A. J. A.* i (1897), pp. 212 ff.; Ziebarth, *Das Recht von Gortyn*, p. 36. Meister supposes that there are three men involved—A has been successful in a suit against B and has seized (in payment) property supposedly belonging to B, but in reality belonging to C. C brings suit to recover his property from A and to strengthen his case brings nine of the neighbors. Both B and C are put under oath. At this point a rather hopeless gap occurs which has been filled, plausibly in the view of several who have accepted it, by the word πλεῖς. Thus the force of the sentence is that after each side has taken its oath that side wins on which the majority swear. The nine neighbors evidently take an oath, but the content is wholly omitted and the circumstances under which it is taken are very obscure.

goods really does not live in the house.[1] The neighbors are summoned by the plaintiff himself for the purpose of swearing the same oath which he swears. The joint character of the oath is shown by the verb *συνεκσομόσαθθαι*. Relatives are not required, but men are selected who naturally know the principal well, the nearest neighbors. Not only however, do they know the principal well, but they must of necessity know the facts of the case also, that is, in what house the man lives. As a result they do not this time merely swear to their confidence in the man, but knowing the facts they make their oath stronger by swearing to the facts. This seems to be a very natural course of development. At first the oathhelpers swear only that a man's oath is good, but occasions like the one under discussion arise in which the oathhelpers, besides being friends and relatives, can not but be cognizant of the very simple fact at issue. It is then a very short step to the point of strengthening the case of the principal by swearing to the fact.

The other cases from the Gortyn laws show a still further development along the same line, but now instead of being men who are chosen because they know the principal and hence presumably know the facts, they are men who are summoned to take the oath because they do know the facts inasmuch as they have participated in a preliminary transaction. The first of these cases deals with the disposition of a child born after the separation of its parents.[2] The mother is obliged to take the child to her husband in the presence of three witnesses. If the father refuses to accept it the mother can dispose of it as she chooses. Then, if the father attempts to recover the child, asserting that it was not duly brought to him, the case is settled by putting the precautionary witnesses and the relatives to an oath to the effect that they took the child in the proper way. These witnesses are to have preference in the oath (*ὀρκιώτεροι*). This means that the father has no recourse. He loses the case. The joint character of the oath and its finality are sufficient to bring these witnesses under the second class of oathhelpers. Headlam,[3] while recognizing

[1] Halbherr translates as follows: "Let three of the nine neighbors swear together (with the person who affirms this), to whom this person will declare beforehand that he on whom the seizers have enforced the sequestration does not dwell in it." The force of *προρείπει* is rather "to notify" and the latter part of the sentence is the content of the oath as Meister correctly translates it.

[2] Code of Gortyn, iii. 44-iv. 8.

[3] *Op. cit.* pp. 48 ff.

the joint character of this oath and its purpose of confirming the statement of the witnesses and the party, has completely failed to see its finality. As soon as these two essential characteristics of the oath of the compurgators in class 2 are seen to be present, there is no need of Meister's detailed argument.[1]

The next case, cited from a second Gortyn inscription, is very similar to the one just discussed, i.e. it is a case of precautionary witnesses who later become oathhelpers.[2] If the domestic animal belonging to one man has been attacked by that belonging to another man and is killed or put to flight, the owner of the injured beast is to pursue it, if it is possible, in case it has fled. But if pursuit is impossible or the animal is dead, he is bound to summon the owner of the offending animal and point out to him the place where his own animal is. This must be done in the presence of two witnesses. Then, if during the suit brought by the owner of the injured animal the defendant charges that these formalities were not complied with, the production of the witnesses and their oath is all that is necessary to settle the matter. The witnesses swear to the fact, as is shown by the content of their oath—*αἰ ἐπεδίετο ἢ ἐπήλευσε ἢ ἐκάλη δεικσίων.*[3] But they swear with the man who formerly summoned them as processual or precautionary witnesses and their oath is final as shown by the word *ὀρκιώτερον*. Hence they belong in class 2.

The next case which Meister cites from the Gortyn code has been generally accepted as convincing proof of the existence of the institution in its German and English sense, i.e. it would fall under type 1 of the present classification. It was this passage which started the

[1] Meister admits that they seem to be fact witnesses, but argues that they have several characteristics which bring them nearer to the class of Eideshelfer: (1) they are sworn—a thing which is never said of the regular fact witnesses in the Gortyn code; (2) the oath is so important that the lawgiver mentions only that and not the content of the oath. (Meister is wrong in this. The Greek explicitly gives the content: *αἰ ἐπέλευσαν*); (3) they swear along with the party.

[2] Ziebarth, *op. cit.* p. 28.

[3] Meister argues here that the witnesses are not even "wissende Eideshelfer" because they could not be expected to be present at the pursuit of the animal. So they swear relying on the character of the party. But the Greek will scarcely allow this interpretation. The passage means that if the animal had fled somewhere beyond reach where the owner cannot get it (the pointing out of a slave in sanctuary in a temple is analogous), he is to point out that place just as much as if the animal were dead. The witnesses were present at that performance and could swear to it.

entire discussion of oathhelpers in Greek law.[1] The case deals with the treatment of an adulterer caught in the act. The one who catches him must bid his relatives ransom him. If they do not do so within a certain period of time, the captor may dispose of him as he wishes. But if the captive, or his relatives in case he is slain, contend that he was not caught in adultery, but that a plot was laid for him, the captor whose position has now been reversed to that of defendant must swear that he did take him in adultery. The oath must be taken with four oathhelpers if it be the case of a free woman, with two others in the case of the wife of an ἀπεταῖρος, the master and one other in the case of a slave.

The joint oath in this case is clear, as is also its finality. But the content has been disputed. That they swore to the fact is made evident by the language (μοικίοντ' ἐλεῖν, δολοῦσθαι δὲ μή). But in spite of this it has been repeatedly asserted that they did not know the facts. The arguments of Zitelmann and Meister on this point are untenable. They maintain that accidental witnesses in such numbers are impossible in such a case and that there would be no time to summon precautionary witnesses. Accidental witnesses are unlikely, it is true. But the second argument is sufficiently answered by the parallel case of the *Relatives of Eratosthenes vs. Euphiletus*.[2] Euphiletus had suspected Eratosthenes of adultery with his wife. So he questioned a slave girl about the matter and persuaded her to tell him when Eratosthenes came to the house. After she had reported to him that the man was there he collected several witnesses and with them went to his wife's apartment where he found Eratosthenes and killed him in the presence of the witnesses. In Attic law a husband who caught a man in adultery with his wife was permitted to slay him on the spot. In this case the defendant distinctly says that he did not warn the witnesses of his intention beforehand. He went to the neighbor's houses as soon as the slave girl aroused him and took whomever he happened to find at home. These witnesses later appeared in court at the time of the trial to testify to the justifiability of Euphiletus' act.[3] It is natural that a man knowing the risk he ran

[1] Code of Gortyn ii. 20 ff. Cf. Zitelmann, *op. cit.* p. 76; Ziebarth, *op. cit.* p. 83; Headlam, *op. cit.* p. 66; Wyse, *op. cit.* p. 467; R. Meister, *op. cit.* p. 35; R. M. E. Meister, *op. cit.* pp. 564 ff.; Dareste-Haussoullier-Reinach, *Recueil* I. 358 ff.

[2] Lysias i.

[3] The witnesses in the Euphiletus case are of course not Eideshelfer in any sense of the word.

of not being able to prove his right to slay should be thus provident. And it is not at all unnatural that the required number of witnesses for cases of the kind should be specified by law. This is just what happens in the Gortyn case. These witnesses know the facts and their oath is joint and final so that they belong to the second class of oathhelpers.

A rather puzzling case from the Gortyn code which Meister has rejected as an example of oathhelpers on the ground that the number of witnesses is not fixed deserves to be included under this class.[1] "If one dies who has gone surety or has lost a suit or owes money given as security or has been guilty of fraud or conspiracy or another stands in such relations to him one shall bring suit against said person before the end of the year. The judge shall render his decision according to the testimony. If the suit is with reference to a judgment won the judge and the recorder, if he is alive and a citizen, and the heirs as witnesses shall give testimony, but in the case of surety and pledges and fraud and conspiracy the heirs as witnesses shall give testimony. After they have testified (or if they refuse to testify—ἀποφείποντι) the judge shall decree that the plaintiff when he has taken oath himself and likewise the witnesses has judgment for the simple amount."[2]

The passage has to do with the procedure to be followed in several different kinds of suits, the character of which can not be made out with any degree of certainty. One point is clear, however, that the defendant is dead and his heirs represent him. In one certain kind of case, that with regard to a judgment won in court, the judge and recorder under whom it was won, are specified as witnesses. In other cases the proper witnesses or the heirs acting as witnesses (μαίτυρες οἱ ἐπιβάλλοντες) are to testify. Two alternative procedures are provided. If the witnesses make their declarations, the judge is to decide in accordance with them. There are two interpretations given for the second procedure arising from the puzzling word ἀποφείποντι. By some it has been interpreted as meaning "after the witnesses have made their declarations." Then the judge decrees that the plaintiff take an evidentiary oath along with his witnesses and if they comply that he have judgment for the simple amount of his debt. According to the other interpretation the witnesses of the defendant refuse to

[1] ix. 24-40. Meister, *op. cit.* p. 576. Zitelmann, *op. cit.* p. 171, accepts it as a case of Eideshelfer.

[2] Translation by Buck, *An Introduction to the Study of the Greek Dialects*, pp. 272 f.

testify. Then the plaintiff resorts to the simple means of formally making a declaration under oath along with his witnesses. If he does so he is declared winner in the suit. That is, his oath and that of his helpers is final. The interpretation of *ἀποφείποντι*, however, does not affect this discussion for in either case the plaintiff resorts to an evidentiary oath with helpers. The oath is joint and final. The question of number need occasion no difficulty. The plaintiff brings forward processual witnesses who witnessed the original contract. There would have been a definite number of them[1] and they all swear in this compurgatory oath. There is no need of specifying the number. It would have been fixed for the original contract and remains the same.

An alleged case of Eideshelfer which has occasioned an enormous amount of discussion is that of the *ἐπωμόται* which an alien plaintiff in Oeanthea or Chaleion was allowed to choose under certain conditions:

> *Αἴ κ' ἀνδιχάζωντι τοὶ ξενοδίκαι, ἐπωμότας ἐλέσ-*
> *τω ὁ ξένος ὠπάγων τὰν δίκαν ἔχθος προξένω*
> *καὶ ϝιδίω ξένω ἀριστίνδαν, ἐπὶ μὲν ταῖς μναϊα-*
> *ίαις καὶ πλέον, πέντε καὶ δέκ' ἄνδρας, ἐπὶ ταῖς*
> *μειόνοις ἐννέ' ἄνδρας.*[2]

The word *ἐπωμόται* has been regarded as referring to additional jurors by many scholars.[3] Buck,[4] Hitzig[5] and Ott[6] interpret the word as

[1] Cf. Simon, "Zu den griechischen Rechtsaltertümer," *Wiener Studien*, xii, pp. 66 ff. He collects all of the extant instances in which a definite number of witnesses is required. It ranges from 1 to 8. Also very large numbers are occasionally found. He does not speak of Eideshelfer.

[2] Hicks and Hill, *Greek Historical Inscriptions*, no. 44.

[3] Oikonomides, *Λοκρικῆς ἀνεκδότου ἐπιγραφῆς διαφώτισις* (cited from Meister); Rangabé (cited by Meister, p. 36); Röhl, *Inscrip. Gr. Ant.* 322; Kirchhoff, *Philologus* xiii, pp. 1 ff.; Dareste, *Revue des études grecques*, ii. p. 318; Eduard Meyer, *Forschungen zur alten Geschichte*, i. 307; Roberts, *Introduction to Greek Epigraphy*, no. 232, p. 357; Dittenberger, *Inscriptiones Graecae* ix. no. 333; Hicks and Hill, *op. cit.* no. 44. Several of these scholars had expressed their opinions before the idea of oathhelpers in Greek law had become established.

[4] *Op. cit.* no 56., p. 218.

[5] *Altgriechische Staatsverträge über Rechtschilfe*, pp. 13 and 45.

[6] *Beiträge zur Kenntnis des griechischen Eides*, p. 120. It is difficult to discern whether Buck and Hitzig conceive of these sworn men as additional jurors or as an entirely new court. Ott asserts that the word means merely "jurors" and is not a compound *ἐπ-ομόται*, but comes from *ἐπόμνυμι* meaning "to swear to a thing."

"sworn men with judicial functions." A small group of scholars who have argued the case in detail interpret the word as oathhelpers.[1] Their arguments are as follows: ἐπωμόται cannot mean additional jurors; no instance of a partial jury thus specially selected occurs elsewhere; if the chosen ones are additional judges, who decides whether they are chosen according to the conditions?; they cannot be fact witnesses since they are chosen (ἑλέστω).

This last argument is sound. They cannot be witnesses of fact. With regard to the other arguments, in the first place in Greek as in English law,[2] trial by wager of law is often an alternative for trial with witnesses. In any case, the oathhelpers are not brought in after the jury has already reached its decision. It is inconceivable that the plaintiff would not be allowed the benefit of oathhelpers from the beginning even if there were fact witnesses. Again, although Eideshelfer are admittedly partisans, yet in this case the ἐπωμόται must not include the πρόξενος and ϝίδιος ξένος of the litigant, the only two people whom there would be much possibility of his knowing well. For, by the terms of the treaty, if a man has made a sojourn of more than a month in Oeanthea or Chaleion he must submit to the regular courts and cannot be tried before the ξενοδίκαι. This restriction, which constitutes the most important argument against Eideshelfer, is disregarded by both R. Meister and R. M. E. Meister. It is impossible to see why the right to choose fifteen or nine Eideshelfer is not just as great or even more of a preference accorded to one side than the right to choose some jurors. R. M. E. Meister's argument is absolutely untenable that if the men are additional jurors they will sit along with the ξενοδίκαι and so there will be no one to decide whether the conditions specified for the choice of them have been complied with or not. The ξενοδίκαι would naturally decide the matter.

To the fact that there are odd numbers in both cases no importance has been attached by either writer. The numbers are too large for fact witnesses, as has been said. It is also too much to suppose that an alien who had been in the place less than a month could get so many Eideshelfer, exclusive, be it observed, of the only two men who could be supposed to know him well, his host and his proxenos. Thus Meister's argument against fact witnesses militates against

[1] R. Meister, *op. cit.* pp. 35 ff.; Gilbert *op. cit.* pp. 468 f.; R. M. E. Meister, *op. cit.* pp. 561 ff.

[2] Cf. the Theban case, p. 65.

Eideshelfer also. But if the ἐπωμόται are considered as a new group of jurors (odd in number, so that there cannot be an equal number of votes on both sides) there is then described by the inscription an extremely fair means of dealing with the case. The plaintiff, an alien, is given a fair deal by being allowed to choose them. His opponent is treated fairly because the *citizens* chosen by the alien are not apt to be influenced to the disadvantage of their fellow citizen. There is no objection to this interpretation either from a linguistic or from a legal standpoint. It is interesting to note in connection with this the last part of the same inscription. In a case in which a citizen proceeds against a fellow citizen in accordance with the terms of the συμβολαί the *magistrates* are to choose *from the worthiest men jurors* ὀρκωμόται who on oath are to decide the case *by a majority decision*. However, another treaty cited by Hitzig[1] proves the matter conclusively if further proof is necessary. The inscription deals with a treaty between Gortyn and Lato in Crete. In suits between citizens of the two places the Gortynian plaintiff brings action at Lato and vice versa and the plaintiff chooses his own judges—δικαστὰνς ἐλέσθω ὁ ἀδικιόμενος. The situation is precisely the same as that at Oeanthea and Chaleion.

To summarize—there existed in Greece two distinct forms of the institution of oathhelpers: those who swore to their confidence in the oath of the principal (they might or might not have knowledge of the facts of the case) and those who swore a joint oath with the principal to the facts. Together with the character witnesses found in Aristotle[2] there are then three types of witnesses who assist the principal otherwise than by merely testifying to the fact. This third class may also, as class 2, have developed from the original oathhelper. The attitude of both types (i.e. class 1 and class 3) towards the litigant is obviously the same, for both have implicit confidence in his honesty. Between the two there is undoubtedly a psychological connection, but only confusion results from failure to recognize the fact that they are not the same. No Greek writer has identified them either explicitly or implicitly. There is no feature that is common to all three types of witnesses. The first two swear in the preliminary oath although they swear to different things. The first and third signify their confidence in the principal, although one swears and the other

[1] *Op. cit.* p. 27. For the text of the decree see *Bull. Corr. Hell.* xxvii, pp. 219 ff.
[2] *Supra*, p. 63.

takes no oath. It is quite reasonable then to treat the second and third types as separate developments of the original oathhelper, inasmuch as each type has a point in common with the original oathhelpers.

The procedure followed in connection with the two types of Eideshelfer was apparently the same although the content of the two oaths was different. The numbers are much smaller than those as a rule found in the English and German systems. There they might be several hundred in number. But in Greek law they range from one in one part of the adultery case at Gortyn to four in another division of the same case. The extant examples, however, are very few and doubtless larger numbers were often required. Definite numbers are required for specific cases by law. In the Gortyn case the number varies with the importance of the individual injured as also in the case of the child. This tallies with Germanic and English law. They are found on the side both of the defendant and the plaintiff. As a rule they are chosen by the litigant, but at Thebes the persons are designated by the court. They are found in both civil and criminal suits. In one case the oath includes a solemn curse and perhaps it always did so as was the case with the earliest type of evidentiary oath.

It was assumed at the beginning of the discussion of the institution of Eideshelfer that it is an outgrowth and strengthened form of the evidentiary oath.[1] This has long been recognized by investigators in the field of Germanic law. But writers on the history of the Greek institution have failed to recognize the connection . A man's own oath which at first had sufficed to clear him without further inquiry gradually came to be felt as insufficient proof of his innocence. So the sworn confidence of his relatives and later of friends was added.[2] Glotz, who treats the institution only as a part of the evolution of family solidarity, explains its development in the following way.[3] He maintains that at first the oathhelpers are relatives of the party and so occupy the same position as avengers of blood. Hence in origin the institution is merely a declaration of family solidarity. The relative who is especially injured becomes the chief avenger and the others are more or less auxiliary. From this comes the fact that

[1] *Supra*, p. 59.

[2] Schröder, *op. cit.* p. 83; Pollock and Maitland, *op. cit.*, ii. 600; Grimm, *op. cit.* ii. 495 ff.

[3] *Op. cit.* pp. 288 ff.

only the accuser or the accused ever has oathhelpers to confirm his oath. That is to say, a witness never has an oathhelper to substantiate his statements. The only difficulty with Glotz' solution is the fact that as a usual thing in the earliest stage of the institution oathhelpers are found only on the side of the defendant. Glotz' argument admits of them on both sides from the very beginning, perhaps even as arising on the side of the avenger or plaintiff. It is not impossible, however, partially to reconcile the two views given above. Perhaps at first a man was allowed to clear himself by an oath. This is felt as insufficient. Then family solidarity steps in and the relatives support the defendant. That is, family solidarity explains the fact that at first relatives are always the oathhelpers. This limits the institution in its beginnings to the defendant's side, or to what Glotz would designate the passive solidarity of the family.

The remainder of Glotz' argument is undoubtedly correct. When the families of the γένος are split apart oathhelpers are chosen in one of two ways. They may be limited to the closest relatives without regard to number or the number may be restricted without specification as to the degree of relationship. The next stage is when the origin is forgotten and neighbors and friends are called on.

But whatever may have been its origin the psychology of the institution is perfectly clear—the partisan spirit which continued to be its dominant characteristic as long as it lasted. Gilbert suggested that it arose out of such situations as the trial scene depicted on the shield of Achilles.[1] To say that it had its origin in such a situation is slightly misleading, as it does not account for the fact that originally the oathhelpers were relatives. But the argument that there is the same feeling, that is, the partisan spirit, in both is quite true. Glotz objects to the use of this passage in the evolution of the institution on the ground that the oathhelper always appears in the character of a subordinate, but that ἀρωγός implies a protector rather than a supporter. Besides, the ἀρωγοί of Homer have no practical influence, as they are not really participants in the trial. Of course, his contention is correct that they are not really oathhelpers, but the word has such a definite partisan signification that it is not going too far to say that the psychology back of the Homeric scene is the same as that behind compurgation. Two other passages are of interest in determining the meaning of ἀρωγός.

[1] *Iliad* xviii. 497 ff. Cf. especially line 502.

ἀλλ' ἄγετ', Ἀργείων ἡγήτορες ἠδὲ μέδοντες,
ἐς μέσον ἀμφοτέροισι δικάσσατε, μηδ' ἐπ' ἀρωγῇ,
μήποτέ τις εἴπῃσιν Ἀχαίων χαλκοχιτώνων.[1]

There is no protection implied here; it is mere partiality.

ὑμεῖς δὲ μαρτύριά τε καὶ τεκμήρια
καλεῖσθ', ἀρωγὰ τῆς δίκης ὁρκώματα.[2]

Here the idea of partisanship is not as distinct as that of mere aid, assistance.

There are found in Athenian law a few kinds of oaths which seem to be survivals of the institution of oathhelpers. In cases before the Areopagus no person could give evidence unless at the beginning of the trial he had taken an oath either as to the innocence or to the guilt of the defendant.[3] Bonner considers it probable that this rule applied also to the other homicide courts, but gives no examples.[4] Leisi extends it to the Palladium and Delphinium. Despite the fact that there are no convincing instances, it is quite probable that the practice was extended to the other homicide courts.

In this case there is apparent the growth of the oathhelper into the regular witness. He still swears the preliminary oath along with his principal, but later in the case he presents his testimony just as an ordinary witness of fact. So his oath is not final. One step further and the preliminary oath with the principal would be abandoned and nothing would be left but the witness of fact.

A group of witnesses analogous to oathhelpers are those who preliminary to a murder trial swear to the relationship of the prosecutor to the murdered man.[5] These witnesses swear the same oath as the principal and swear it along with him. With the joint preliminary oath, however, the analogy ends, for it was not final. Even women and children were allowed to take oath to establish the relationship of the prosecutor to the deceased.[6]

[1] *Iliad* xxiii. 573 ff.

[2] Aeschylus, *Eumenides* 485 f.

[3] Lysias iv. 4. Cf. Bonner, *Evidence in Athenian Courts*, pp. 28 ff., 76. Leisi, *Der Zeuge im attischen Recht*, p. 57.

[4] "Evidence in the Areopagus," *C. P.* vii. p. 453.

[5] It was impossible for a man to prosecute another for murder if he was not a relative of the deceased. Hence the right to prosecute had to be established before the action could take place.

[6] Demosthenes xlvii. 70. For a full discussion of the subject cf. Bonner, "Did Women Testify in Homicide Cases in Athens?", *C. P.* i. pp. 127 ff. Cf. Leisi, *op. cit.*

The voluntary oath which might be offered in defense of a litigant has in common with oathhelpers sworn confidence in a man.[1] This seems generally to have been taken by relatives.[2]

There are then in Attica a few survivals of the institution. Meister, failing to see these survivals, asserted "In Attika hat sich keine Spur von ihnen gefunden, wie leicht erklärlich ist: Eideshelfer sind auf kleinere Verhältnisse zugeschnitten, wo einer den anderen kennt; in der grossen Stadt und bei entwickelten Verkehrsverhältnissen können sie nicht vorkommen."[3] It is interesting to note that in England, one of the greatest commercial countries in the world, the institution was not abolished until 1833.

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p. 18 and Lipsius, *op. cit*, p. 874, who while accepting Bonner's main contention —that women and children could be witnesses in a homicide case—insist that the evidence of the wife and children is on the fact at issue. At any rate they would swear to the same thing that the prosecutor swore to in his δωμοσία when the case came up for preliminary hearing (Bonner, *op. cit.* p. 129) and that is all that is of consequence in this discussion.

[1] Ziebarth, *De iureiurando in iure Graeco quaestiones*, p. 41, and Meier-Schömann-Lipsius, *Der attische Process*, ii. 899, n. 379 for plentiful examples of the oath.

[2] Ziebarth gives an illustration of this oath which Meister, *op. cit.* p. 578, has conclusively shown to be false. For the text of the inscription see *Inscript. Graecae* ix. 1. 334.

[3] *Op. cit.* p. 581.

INDEX

adultery, treatment of 36
αἴδεσις 46
amnesty law of Solon 26; 48
arbitration 1; compulsory 2; 9; at Gortyn 30
archon, institution of 21
archon basileus, one of the ephetae 17; institution of 21; jurisdiction of in homicide 23; 45
archons, Athenian, judicial functions of 22
Areopagus, institution of 11 ff.; mythical trials at 13; 50; compared with Homeric council of Elders 12; functions of 15; procedure of before Solon 49 ff.
ἀριστίνδην 20
assembly, Homeric 2; 26

banishment of murderers 46
blood feud 5; 9
blood money 5

challenge 55
Charondas, laws of 29; *ἐπίσκηψις* of 43
codes 2; 32
compurgation, in the Germanic and English systems 59 ff.
council of Elders, at Athens 11; at Sparta 16; in Crete 16
criminal law 2; 3; 32
Cylon, curse of 21

δίκαι at Athens 32
δικάζειν procedure at Gortyn 37 ff.
δικασταί in Crete 28
dokimasia 20
Draco, homicide laws of 44 ff.

Eideshelfer 59 ff.
εἰσαγωγεῖς 26
ephetae, in all five homicide courts 14; institution of 16 ff.; age qualification of 16; number of 17; etymology of 18; commissions of the Areopagus 17; class qualification of 20; increase in number of for important trials 21; in laws of Draco 45 ff.
Ephors, judicial functions of 29
ἐπίσκηψις instituted by Charondas 43
ἐπωμόται 72
evidentiary oath 1; 34; of the principal 55 ff.; with oathhelpers 59 ff.; survivals of in Athens 58

Forty 26

Gortyn, date of code of 32
γραφαῖ at Athens 32
homicide 3 ff.; 44 ff.; types of distinguished 19; 49; unpremeditated 44 ff.; justifiable 47; treatment of at Sparta 54; at Cyme 54
interdict, in laws of Draco 44
investigation, preliminary in homicide 45

"kings" in code of Draco 23
kingship, Homeric 11; transition from to aristocracy 21
κόσμοι in Crete 28; 32
κόσμος ξένιος 28; 29

magistrates, judicial functions of 3, 22; 28; at Athens 21
μνάμων at Crete 29

oathhelpers 54; 59 ff.; in Gortyn code 62 ff.; not mentioned by Aristotle 63; classes of in Greek law 64 ff.; no technical term for in Greek law 63; at Cyme 65 ff.; survivals of in Attic law 77
oaths, in the Gortyn code 42
ὀμνύντα κρίνειν procedure at Gortyn 37 ff.
Orestes, trial of 7; 50 ff.

perjury, treatment of by Charondas 43
phylobasileis 23
polemarch 11; institution of 21
pollution, in connection with homicide 4; 5; 9
prosecution, right of in homicide 3; 45
Prytaneum, in amnesty law of Solon 26; institution of 48
purification from blood guilt 5

sanctuary 7
self-help 1; at Gortyn 35
slaves, rights of at Gortyn 34

testimony, oral at Gortyn 37
Thesmothetae, institution of 24 ff.; number of 24; functions of 24 ff.
Three Hundred, court of 21
τίται at Gortyn 30

widows, legal rights of at Gortyn 35
witnesses, in Gortyn code 40 ff.; classified by Aristotle 63
women, legal rights of at Gortyn 34

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